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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

FRANK STEVENS,
Respondent,

vs.

R. A. NORTHWAY, Doing Business Under the Assumed Name of Northway Clinic and Hospital, R. A. Northway, Roy B. Fisher,
Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a foreign corporation,
Petitioner.

No. 425

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, WITH SUPPORTING BRIEF

May it Please the Court:

The Answer of Frank Stevens, the Respondent herein, to the Petition of the Garnishee Defendant herein for a Writ of Certiorari, respectfully presents to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On October 6, 1938, an Isabella County Circuit Court jury rendered a verdict against the Principal Defendants (R., pp. 3, 4) because of permanent injuries sustained from X-Ray burns caused by Defendants in Janu-

ary of 1937. During the trial, which lasted over seven full days, Attorneys Frederick J. Ward and H. Monroe Stanton appeared for and represented the Principal Defendants (R., p. 165). Judgment was entered against the Principal Defendants on November 15, 1938, (R., p. 133) and eventually became final. On March 8, 1939, a Writ of Garnishment was issued (R., p. 6) and was served on Petitioner as Garnishee Defendant on March 10, 1939, (R., p. 8), and required a disclosure to be filed in the Isabella County Circuit Court on or before March 31, 1939. On March 28, 1939, Attorneys Frederick J. Ward and H. Monroe Stanton assumed the anomolous position of now appearing as the attorneys for the Garnishee Defendant, and in such antagonistic position, filed a Petition and Motion in the local Circuit Court to remove said garnishment proceeding to the United States District Court, Eastern District, Northern Division, claiming diversity of citizenship and a separable controversy (R., pp. 10 to 14). On April 4, 1939, the Circuit Court found and held that the Petition did not satisfy the jurisdictional requirements for removal and denied the Motion (R., p. 19). On April 11, 1939, thirty-two days after service of the Writ upon the Garnishee Defendant, the Respondent caused an Order of Default to be entered against Petitioner (R., pp. 24 to 27). On April 15, 1939, and in defiance of the Court's Order of April 4, 1939, Petitioner filed its Notice of Removal in the Federal District Court (R., p. 20) and claimed to have filed a disclosure in the Federal Court on April 10, 1939. On April 15, 1939, a Motion to Remand was made in the Federal District Court (Amended R., p. 75) claiming that said Federal District Court had no jurisdiction of said matter, for the reason that there was no diversity of citizenship and no separable controversy present. At the conclusion of said hearing, the learned Senior District Judge, the Honorable Arthur J. Tuttle, made and entered an Order remanding said cause because of lack of jurisdiction (R., p. 21), which Order was filed in the State Circuit Court on April 17, 1939 (R., p. 21). On April 11, 1939, the attorneys for the Garnishee Defendant were notified by special delivery letter that proofs would be submitted on April 17, 1939, (R., p. 148), and on said

day, after the Order of Remand was filed, and after another Order of Default was entered, proofs were submitted and judgment taken against the Petitioner (R., pp. 27 to 32). On April 18, 1939, the Petitioner, now acting through the same attorneys who formerly represented the Principal Defendants in the main suit, appeared specially and filed a Motion to Set Aside the Default of April 17, 1939. No Motion or attempt was made to set aside the default entered on April 11, nor was any motion or attempt made to vacate the judgment theretofore entered. Garnishee Defendant, in its Motion, made no allegation or claim whatever of any kind that any Federal statute or right had been violated, and no claim that the Fourteenth Amendment had been violated (R., p. 62). On April 27, 1939, the Circuit Court denied Petitioner's Motion (R., p. 99). No disclosure was ever filed by Petitioner in the State Circuit Court.

On May 1, 1939, Petitioner filed its Claim of Appeal (R., p. 104) and its Assignment of Error and Reason and Grounds of Appeal, but said pleadings contained no allegation or claim whatever that any Federal statute or right had been violated and no claim was made that the Fourteenth Amendment had been violated, nor was any such claim made in the argument by Petitioner's attorneys before the Michigan Supreme Court. On April 1, 1940, the State Supreme Court affirmed the Circuit Court (R., pp. 187 to 189) and held that in Michigan the action of garnishment was an ancillary proceeding and that the Default was properly entered and taken because no disclosure had ever been filed in the Circuit Court by the Garnishee Defendant. On April 10, 1940, Petitioner's attorneys advised Respondent's attorneys that they would pay said judgment immediately (Amended R., p. 74). On April 20, 1940, Petitioner filed its Motion for a Rehearing, and for the first time claimed that a Federal question was involved and for the first time claimed that the Fourteenth Amendment had been violated (R., p. 201). On June 18, 1940, the Michigan Supreme Court denied said Motion (R., p. 202).

On June 24, 1940, Petitioner resolved to perfect an Appeal to this Court (R., p. 204), but the Record was

prepared without consulting Respondent's attorneys, and same is incomplete. When Petitioner filed its Motion for Rehearing, same was accompanied by a Supporting Brief (R., pp. 190 to 202) and both the Application or Motion and the Brief were printed by Petitioner in the Record. Respondent filed his Answer to said Motion for Rehearing and same likewise was accompanied by a Supporting Brief. However, Petitioner, while including its own Motion and Brief in the Record, entirely omitted Respondent's Answer and Supporting Brief, and same is therefore appended hereto as a part of the Amended Record. Likewise on page twenty-four of the Petition herein, Petitioner infers that the Order of Remand was not based upon jurisdictional grounds. It therefore is necessary to place before this Court the Motion upon which the Order to Remand was based. Same is therefore appended hereto as a part of the Amended Record.

II.

REASONS RELIED UPON FOR DENIAL OF THE WRIT

Respondent's position briefly summarized is as follows:

The action of garnishment in Michigan, as determined by Statute, Rules of Court and decisions of both the Michigan Supreme Court and the United States Supreme Court, is an ancillary proceeding and inseparably connected with the main suit, and is not an independent suit or proceeding. It is a civil process in the nature of an equitable attachment for the collection of debts. The United States Supreme Court has affirmed the decisions of the Michigan Supreme Court so interpreting the nature of the garnishment process in Michigan. When the Garnishee Defendant presented its Petition and made its Motion to Remove Said Garnishment Action to the Federal District Court, the State Court had the right and duty to pass upon the sufficiency of the Petition for Removal. Because such Petition and Motion showed on their face that a garnishment action was involved, not a separable controversy; therefore not the requisite diversity of

citizenship and no removable cause, the Circuit Court rightfully denied the Motion for Removal.

After the Garnishee Defendant, in defiance of the State Court's Order, certified said cause to the Federal District Court, the Federal Court rightfully remanded said cause because the pleadings on their face showed that a garnishment action was involved and that according to the decisions of the Michigan Supreme Court, which the Federal Court was bound to respect, there was no separable controversy and no diversity of citizenship, and that therefore the Federal District Court had no jurisdiction over the subject matter.

Because the Federal Court could have no jurisdiction of the cause, it never acquired jurisdiction. Since the State Court originally had jurisdiction, the State Court never lost jurisdiction of the cause. Therefore the default of April 11, 1939, was regular and valid, and any pleadings filed in the Federal District Court in the interim between the attempted removal and the actual remand are null and void, or at least subject only to such force or effect as determined by the State Court. There was never any disclosure filed in the State Court as required by Statute and Rule of Court. Disregarding the question of the validity of the default of April 11, the default made and entered in the State Court on April 17, 1939, after the Order of Remand was filed in the State Court, never having been attacked by the Garnishee Defendant, was unquestionably valid and supports the judgment entered thereafter.

The Order of the Federal District Court remanding the cause back to the State Court, was binding upon the State Courts and cannot be reviewed by them. The Federal Code so provides. The Michigan Supreme Court never passed upon the validity of the said Court's Order of Remand, but properly accepted same as binding upon it. The Garnishee Defendant never attempted to file any disclosure in the State Court at any time, though it had thirty-two days in which to file such disclosure before the first default was taken, and thirty-eight days in which to file same before the second default was taken. No Order was ever made by the State Courts denying the

Garnishee the right to file its disclosure in the State Court and thereby protect its rights while it was attempting to remove said cause to the Federal Court. Nor would the filing of such disclosure affect or prejudice any valid right of removal which it might have had.

The Garnishee Defendant at no time, in the State Court, the Federal District Court or in the Michigan Supreme Court ever claimed that a Federal right had been violated or that its property had been taken without due process. The first time such claim was made was upon the Motion for Rehearing in the State Supreme Court and after Garnishee Defendant previously had agreed to pay said judgment (Amended R., p. 54). Up to that point no Federal question was ever raised by the Garnishee Defendant. The Record speaks for itself. No pleading or Assignment of Error recites any Federal question, and such claimed Federal questions were therefore never passed upon in the State Court of first instance or by the State Appellate Court, or could be. Federal questions thus raised for the first time upon a Motion for Rehearing will not and cannot be considered by this Court.

This appeal is vexatious. After the Michigan Supreme Court affirmed the Lower Court, the Garnishee Defendant agreed to take care of said judgment immediately (Amended R., p. 54). Because of this fact, and because Petitioner seeks to review claimed Federal questions never raised before and because the statutes and decisions are so clear and uniform in holding that such matters cannot be accomplished on appeal, Respondent maintains that this Appeal delays the proceedings on the judgment of the Lower Court and obviously was sued out merely for delay. Respondent therefore contends that he is entitled to the damages provided for by Section 2 of Rule 30 of the United States Supreme Court Rules.

Wherefore, Respondent respectfully prays that this Honorable Court deny Petitioner's Application for a Writ of Certiorari, and because of the delay caused by Petitioner, that it award to Respondent such additional damages upon the amount of the judgment, as provided

for by the rules of this Honorable Court, as shall be meet and just. And your Petitioner will ever pray.

BRIEF DENYING RIGHT TO PETITION FOR WRIT OF CERTIORARI

I.

The Opinion of the Supreme Court of the State of Michigan appears both in the Record at pages 187 to 189 and in the Petition at pages 5 to 8. An examination of this Opinion reveals that same merely affirms the questions of local or state procedure raised and passed upon by the Lower Court.

II.

JURISDICTION

This Court has no jurisdiction over the matters set forth in the Petition. Rule 38 of the United States Supreme Court Rules, and especially Section 2 thereof, has not been complied with by the Petitioner. Likewise Rule 12, which relates to jurisdiction, has not been satisfied by the Petitioner, for the reason that no Federal questions were raised by the Petitioner in its appeal to the State Supreme Court, nor was there ever a claim made that it had been deprived of its property without due process of law, until for the first time, in the Petitioner's Motion in the State Court for a Rehearing. A claimed federal issue raised at such a late stage of the proceedings comes too late to be considered by this Court.

III.

STATEMENT OF THE CASE

In view of the inaccuracies and omissions in the Petition, Respondent has prepared a Statement correcting such inaccuracies and adding such omitted facts as were necessary. The essential facts necessary have been here-

tofore set forth in the Respondent's Summary Statement (Answer to Petition, p. 1)

IV.

SUMMARY OF ARGUMENT

The controversy between the Petitioner and Respondent is a Garnishment Action which has consistently been determined by the Michigan Courts to be an ancillary proceeding, in the form of an equitable attachment, and therefore inseparable from the main suit or proceeding, and since the Principal Defendants are also residents of Michigan, the action as such could not be removed to the Federal District Court. The State Court properly refused to transfer said cause. The Federal Court was bound by the construction given the Michigan Garnishment Statute, and it respected the decisions of the Michigan Supreme Court interpreting its Garnishment Statute. The Federal District Court definitely determined that it never had jurisdiction of this cause. The State Court therefore always retained jurisdiction. Any pleadings filed in a Court without jurisdiction are a nullity. No Disclosure was ever filed in the State Court, though Petitioner could have filed same without waiving any of its rights. When the Federal District Court remanded said cause, the State Courts merely accepted such decision. The State Courts never passed upon any claim that Petitioner had been deprived of its property without due process of law, or in violation of the Fourteenth Amendment, for the reason that no such Federal questions were ever raised by the Petitioner. The Order of Remand was final and unappealable, and cannot be reviewed or attacked, directly, indirectly or collaterally. If Petitioner's Writ were granted, the effect would be to defeat the very purpose of the policy defined by Congress, as set forth in Section 71 of Title 28 of the United States Code Annotated, that an Order of "Remand shall be immediately carried into execution, and no appeal or Writ of Error from the decision of the District Court so remanding such cause shall be allowed."

ARGUMENT

I.

The action of garnishment in Michigan is ancillary to the main suit, not a separable or an independent proceeding. The Plaintiff and Principal Defendants, all being residents of Michigan, such garnishment action was therefore not a removable cause.

The Michigan Supreme Court, in interpreting the statute governing garnishment in Circuit Court after judgment, has uniformly held, without exception and from an early date, that such garnishment action is an ancillary, not an independent action.

> "Section 8145. How. Stat., provides how suits may be commenced in the Circuit Courts of this State against foreign corporations. The Writ of Garnishment and proceedings thereon are always ancillary, and the service of such Writ is not the commencement of an action." *The Milwaukee Bridge & Iron Works v. Henry N. Brevoort, Wayne Circuit Judge,* 73 Mich., at Page 157.

> "The situation must depend upon the principal suit commenced. Garnishment is ancillary and not the commencement of an action." *Wyngarden v. LaHuis,* 251 Mich. 276.

The Michigan Supreme Court merely affirmed this long established rule of law in its opinion in this case (R., p. 187) when it said:

> "The garnishment proceeding is ancillary to the action against the principal Defendants and wholly dependent thereon and not the commencement of an independent action."

In a very recent case, the United States Supreme Court likewise affirmed the foregoing rule of law and accepted the construction placed by the Michigan Courts upon the Michigan Garnishment Statute, when it held that in Michigan a Writ of Garnishment is a civil process of law, in

the nature of an equitable attachment. See *Federal Housing Administration v. Ruth Burr,* 84 L. Ed. 427, 60 Sup. Ct. 488. We quote from the opinion:

> "Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts. In Michigan a writ of garnishment is a civil process at law, in the nature of an equitable attachment. See *Posselius v. First Nat. Bank,* 264 Mich. 687, 251 N. W. 429, 90 *A. L. R.* 342."

Also see *Dobie On Federal Procedure,* Pages 402 and 403.

II.

Federal Courts respect the decisions of State Courts interpreting their own Statutes and are bound thereby. On attempted removal of this case, the United States District Court decided that this garnishment action was not an independent suit, was not a separable controversy, that there was not complete diversity of citizenship, and that it therefore had no jurisdiction. It therefore remanded same. Such order of remand cannot be reviewed by the State or Federal Courts and is final and unappealable.

A. The rule is ably stated in one of the cases which the Federal District Court considered upon the hearing in this case on the Motion to Remand:

> "A garnishment proceeding, provided by the statutes of Missouri, as construed by the Courts of the State, is not an independent suit, but is supplemental to the main action and provides one of the means of securing a satisfaction of the Judgment. This is the interpretation that the Courts of Missouri have placed upon the statute — All of the Missouri cases seem to be to the same effect. *The construction thus given the statute is not to be ignored in this Court." Brucker v. Georgia Casualty Company,* 14 F. (2d) 688.

In *Lawley et al. v. Whitesis et al.* (24 F. Supp. 698, September 28, 1938), the Federal Court held:

> "The Supreme Court of Oklahoma has determined that garnishment after judgment is practically an equitable execution brought for the purpose of reaching nonleviable assets and is a means provided for obtaining satisfaction of a judgment of a creditor out of the property of the debtor. See *First National Bank of Cordell v. City Guaranty Bank of Hobart*, 174 Okl. 545, 51 P. 2d 573; *Davidson v. Finley*, 96 Okl. 291, 222 P. 678. It is thus well established that the proceedings in garnishment after judgment, is auxiliary to the main case and is only a means provided for obtaining satisfaction of a judgment. It has been construed by the Supreme Court of Oklahoma to partake of an equitable execution. *The construction of the Statutes of Oklahoma* governing garnishment proceedings after judgment, *is binding upon this court. Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 *A. L. R.* 1487; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.
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> "Since the rendition of the decisions in *Erie R. Co. v. Tompkins, supra,* and *Ruhlin v. New York Life Insurance Co., supra, this court is bound by the construction placed upon garnishment proceedings similar to those involved here, by the Oklahoma Supreme Court, rather than expressions from other Federal Courts with respect to garnishment generally.*"

In the very recent case of *American Automobile Insurance Company v. Freundt, et al* (103 F. (2d) 613, *C. C. A.*, 7th Circuit, April 27, 1939) the Circuit Court of Appeals held that it was bound by the decisions of the Illinois Supreme Court holding that garnishment was merely an ancillary proceeding and that therefore the issue in the garnishment action as between the Plaintiff and the Insurer could only be settled in the State Court.

Also see *Towey v. Maryland Casualty Company* (29 F.

Supp. 785, D. C., W. D. Virginia, October 28, 1939) wherein the Court held:

> *"The sole question in the case is whether this garnishment under the applicable Virginia statute is an ancillary proceeding.*
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> * * *
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> "(5) It is not necessary for me, in sustaining the Motion to Remand, to express concurrence in these opinions holding that garnishment proceedings are (even under the statutes of the states in question) in their essential nature independent actions. Nor need I hold that an unusual and extreme statute cannot make garnishments really independent actions rather than ancillary proceedings. *All that I need decide here,* and all that I do decide, *is that under the Virginia Statutes garnishments are mere ancillary proceedings* which are not removable from a state to a federal court."

Also see *Federal Housing Administration v. Ruth Burr* (84 L. Ed. 427, 60 Sup. Ct. 488) in which this court only recently decided that "Whether by Michigan law execution under such a judgment may be had is, like the availability of garnishment, *Federal Land Bank v. Priddy,* supra, (295 U. S. 229, 79 L. Ed. 1408, 55 S. Ct. 705) a state question."

This court very recently affirmed this rule in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82, L. Ed. 1188.

B. Even though Petitioner, on page 24 of its Petition, infers that the garnishment action was not remanded because of lack of jurisdiction, nevertheless a cursory examination of the Motion to Remand (Amended R., p. 75) very clearly shows that the sum and substance of the entire Motion to Remand was that the Federal District Court had no jurisdiction over the garnishment action or the parties. Such Order of Remand is binding upon the State Courts and cannot be reviewed by them, and likewise such order cannot be attacked directly, indirectly or collaterally, because it was final and unappealable.

See Section 71 of Title 28 of the United States Code Annotated, together with annotations thereunder.

See 114 *A. L. R.*, 1477, wherein the following rule is set forth:

> "Specificially referring to the Federal statute whereby it is provided that the order of the inferior Federal Court remanding the cause to the State Court shall be immediately carried into execution, and that no appeal or writ of error from the decision shall be allowed, *State Courts have held uniformly,* albeit in varying phraseology, *that the Order of Remand is not reviewable in the State Courts.*"

This rule was definitely settled in *Missouri Pacific R. Co. v. Fitzgerald,* 160 U. S. 556, wherein the court stated:

> "If the Circuit Court remands a cause, and the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment."

C. In a very recent case decided on January 4, 1937, this court, speaking through the Honorable Justice Van Devanter, definitely determined the finality of an Order of Remand:

> "We are of opinion the petition was rightly denied, first, because the remanding order was not subject to appellate re-examination on petition for mandamus or otherwise, * * * the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

Petitioner, on page 24 of its Brief, infers that the Order of Remand was not based an want of jurisdiction. This is conclusively refuted by reference to the Motion to Remand (Amended R., p. 75) in which the Principal Defendants "appear specially * * * expressly denying that this court has jurisdiction of this cause or these Defendants." A reference to this pleading discloses the

Employers Reinsurance Corp. v. Bryant, U. S. District Judge, 299 U. S. 374, 81 L. Ed. 289, 57 S. C. 273,

reasons given for the foregoing contention that the Federal Court had no jurisdiction over the subject matter or the parties.

III.

By the order of remand the Federal District Court determined that it never had jurisdiction, and any disclosure filed therein was therefore a nullity. The State Court, therefore, never lost jurisdiction and the first default taken was valid. Even if the first default should be disregarded, still a second default was taken after the order of remand was made and filed in the State Court, which latter default supports the judgment entered.

In *Tracy Loan & Trust Co. v. Mutual Life Insurance Co. of New York, et al.* (79 Utah 33, 7 Pac. Rep. (2d) 279) the court said:

> "(3) It is well settled that it is for the state Court to determine what effect, if any, shall be given pleadings filed or orders made in Federal courts while the cause was pending there before remand. 54 C. J. 376; *Ayres v. Wiswall,* 112 U. S. 187, 5 S. Ct. 90, 28 L. Ed. 693; *Cates v. Allen,* 149 U. S. 451, 13 S. Ct. 883, 37 L. Ed. 804; *Broadway Insurance Co. v. Chicago G. W. R. Co.* (C. C.) 101 F. 507.
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> "(4) This rule is well supported by cases which hold that, where remand is based on want of jurisdiction on the part of the Federal Court, any findings or orders made by such court during the time the case was there are void and are not binding upon the State Court nor upon the parties. *Graves v. Corbin,* 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462; *Ayres v. Wiswall,* supra."

In *John Roberts v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (48 Minn. 521) the Minnesota Supreme Court held that the judgment entered against the Garnishee Defendant between an attempted removal and the Order of Remand, was a valid judgment. The *Roberts*

case was eventually appealed to the United States Supreme Court and on December 7, 1896, as reported in 164 U. S. 703, application for a writ of certiorari was denied, and by such denial, *the United States Supreme Court affirmed* the holding of the lower District Court *that the judgment, or act of the State Court made in the interval, was valid.*

This rule was followed in *E. A. Pearson v. Joseph Zacher, Western Surety Company, Garnishee,* (177 Minn. 182, 1929) wherein the court held:

> "It is sufficient for us to held, as we do, that on such removal of a cause, if it afterward appears that the suit was not a proper one for removal and is remanded by the Federal Court, any act of the State Court made in the interval is valid. *Yankaus v. Feltenstein,* 244 U. S. 127, 37 S. Ct. 567, 61 L. Ed. 1036.
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> * * *
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> *"But where a motion for removal is made and the Petition is not effective for that purpose, or after removal the Federal Court remands the cause for want of jurisdiction, and in the interim orders are made or judgment entered by the State Court, these are valid notwithstanding they are made after attempted removal. Youkaus v. Feltenstein, supra,* * * * The reason or theory underlying these results is that when a case is remanded by the Federal Court for want of jurisdiction, the State Court is regarded as never having lost its jurisdiction, and the Federal Court never acquired jurisdiction. *Finney v. American Bonding Co.,* supra; and *Germania Fire Insurance Co. v. Francis,* 52 Miss. 457, 24 Am. Rep. 674; 54 C. J. #45."

In the case at bar, regardless of the validity or nonvalidity of the first default, because filed after the cause was certified to the Federal Court, nevertheless the Order of Remand made on April 15, 1939, definitely determined that the Federal District Court had no jurisdiction over the cause and that the State Court did have jurisdiction. The default of April 17 taken after the

Order of Remand was filed was thereupon entered at a time when there was no question whatever but that the State Court had jurisdiction over the cause. Such default has been determined to have been a properly entered default, and same therefore supports the judgment herein entered.

IV.

The claimed Federal question now raised by the petitioner for the first time, never having been raised before, will not and connot be considered on appeal.

A careful reading of the Petition filed herein discloses that on pages 4 and 8, Petitioner makes the claim that it was deprived of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The claim merely reiterates Petitioner's contention which was made for the first time in its Petition for Rehearing filed in the State Appellate Court. Prior to that time, no claim was ever made at any stage of the proceedings that any Federal right or statute had been violated. The rules are clear that this question was not properly raised at that stage of the proceedings.

Rule 12 of the United States Court Rules especially provides the requirements which must be satisfied before Federal questions can be reviewed by this Court. We submit that Petitioner cannot and does not satisfy the requirements of Rule 12 for the reason that the Record clearly discloses that no claim was ever made by the Petitioner that a Federal statute or a Federal right had been violated, until the Petition for Rehearing was filed in the State Appellate, which was too late.

See *American Surety Company, Plff. in certiorari v. Vivian F. Baldwin, et al, Vivian F. Baldwin et al, v. American Surety Company* (287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, November 14, 1932), which is also reported in 86 *A. L. R.* 298, in both of which cases the Appellant Surety Company claimed that the judgments were void

under the due process clauses of the Fourteenth Amendment. The court held:

> "First. The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed for failure to make seasonably the Federal claim. * * * The Baldwins appealed to the Supreme Court of Idaho; and upon the presentation of their appeal no Federal question was raised by either party."
>
> "The Surety Company *petitioned for a re-hearing.* In that Petition, besides reiterating several of its previous contentions, it urged, *for the first time,* that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The Petition was denied without opinion. The Federal claim there made cannot serve as the basis for review by this Court. The contention that a Federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings *but solely as a matter of state law.* There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. (Citations).
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> "Second. In No. 21, * * * *since the constitutional issue as to jurisdiction might have been presented to the State Supreme Court and reviewed here,* the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction". (Citations).

Also see 87 *A. L. R.* 307.

V.

The petition herein delays the proceedings of the judgment of the Lower Court and appears to be sued out merely for delay.

Section 2 of Rule 30 of the United States Supreme Court Rules provides that:

> "In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment."

Counsel concede that there undoubtedly is no hard and fast rule by which it can be determined whether or not it appears that an appeal has been sued out merely for delay. No Petitioner or Appellant would ever admit it was appealing merely for the purpose of delaying the enforcement of the judgment. However, various circumstances may indicate such purpose, and Respondent desires to point out these various circumstances, which when taken together, clearly indicate a deliberate design to prolong this litigation merely for the purpose of delay.

In the summer of 1937, when the Respondent, as a patient of the Principal Defendants, demanded compensation for his injuries, Petitioner's representatives investigated the claim and assured the Principal Defendants that they were fully covered under the policy (R., p. 40), and further instructed the Principal Defendants to contact their attorney in Saginaw if a suit was threatened or commenced. This was done and a settlement for Respondent's injuries was discussed and offered by the Petitioner's attorney (R., p. 42) and still later a more substantial offer or settlement was made by the attorney representing the Petitioner (R., p. 115). These offers were never accepted. A lengthy trial was had, and the same attorneys who now are appearing for the Petitioner, then appeared and defended the Principal Defendants. After the verdict was rendered, though a

motion for a new trial was made (R., p. iv), the judgment finally entered was never appealed from, for the obvious reason that the attorneys who represented both the Principal Defendants and the Petitioner, concluded that Respondent was entitled to the damages so sustained. The Writ of Garnishment issued and served, gave Petitioner until March 31, 1939, or twenty-one days in which to file its Disclosure in the State Court. Petitioner willfully ignored the command of the Writ and never filed any Disclosure in any court up to that time. Instead, Petitioner chose to delay the proceeding by moving the State Court for an Order transferring said cause, which motion was denied (R., p. 19). Instead of abiding by such order, Petitioner chose to delay said matter still longer by ignoring said order and thereupon filed, ex parte, certain papers and instruments in the Federal District Court (R., p. 20) which had no jurisdiction whatever over said cause. On April 15, 1939, after the Federal Court refused to accept jurisdiction, one of the attorneys for Petitioner admitted to Respondent's attorney that the Petitioner's insurance company "had given the Plaintiff the run-around long enough" and said attorney for Petitioner further stated that "he did not especially care to proceed with said case; that if the above case had been handled the way it should have been and the way he wanted to handle it, that it would have been settled long ago" (R., p. 84). At the same time, said Petitioner's attorney again attempted to settle said cause (R., p. 86). Shortly thereafter, and well knowing that an Order of Remand was not applicable, one of Petitioner's attorneys, in an endeavor to exact a favor from one of the Principal Defendants, deliberately threatened to appeal said cause to the Circuit Court of Appeals in Cincinnati, and thereby put the Principal Defendants to additional attorney fees and expenses (R. p. 90). This obviously was merely a threat to delay the proceedings.

After the Michigan Supreme Court affirmed the Lower Court, one of the attorneys for Petitioner wrote to Respondent's attorney, and the full context of the letter is included herein (Amended R., p. 74), and requested a statement of the amount due in the case and stated that

he would "arrange to see that it is taken care of immediately." Instead of paying said judgment, as promised, Petitioner deliberately sought to delay said proceeding further by filing an Application for Rehearing and in same, for the first time, claimed that certain Federal rights had been violated, though such claim had never been made or raised before. Respondent contends that where the decisions of the United States Supreme Court are so clearly patent and uniform, in holding that an Order of Remand is not appealable, and in holding that Federal questions raised for the first time on a Petition for Rehearing cannot be considered on appeal, and where an appeal is nevertheless taken, that same is clearly for the purpose of delaying the enforcement of the judgment.

In view of all of the foregoing facts and circumstances, Respondent contends that Petitioner's entire course of conduct throughout the entire proceedings, is clearly indicative of the fact that this appeal was sued out merely for the purpose of delay, and that therefore additional damages should be assessed against the Petitioner under the Court rule to partially compensate him for this delay and his added expense.

CONCLUSION

Petitioner, throughout its Petition and Brief, prefaces its arguments with the words "'*if*' the cause was removable," and continually speaks of a "proper" Petition. Respondent contends that the State Court decided that a proper Petition was not filed and that the cause was not removable. And more important, the Federal District Court, when it remanded the cause, definitely determined that the cause was not removable and such determination is and was final. This court has consistently so held. And likewise this court has consistently held that Federal questions raised for the first time on a Petition for Rehearing, will not and cannot be considered. The Petition must be dismissed.

The position of Petitioner, as set forth in its Petition, is the same as set forth in its Motion for a Rehearing and

Supporting Brief. Such position was fully answered in Respondent's Answer to the Motion for Rehearing and Supporting Brief, and said Answer is appended hereto as a part of the Amended Record. Respondent incorporates the authorities therein cited in further support of its Brief filed herein and respectfully refers this court to same and especially to pages 1 to 3 thereof, for further answer to any of the questions raised by the Petioner herein.

Respectfully submitted,

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AMENDED RECORD

STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM ISABELLA CIRCUIT COURT

Hon. Ray Hart, Circuit Judge

FRANK STEVENS,
Plaintiff and Appellee,

vs. Cal. No. 40692.

R. A. NORTHWAY, doing business under the assumed name of Northway Clinic and Hospital, R. A. NORTHWAY, ROY B. FISHER,
Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a foreign corporation,
Garnishee Defendant and Appellant.

BRIEF FOR PLAINTIFF, OPPOSING MOTION FOR RE-HEARING

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Received April 30, 1940, Jay Mertz, Clerk Supreme Court.

[i]

AUTHORITIES CITED BY PLAINTIFF

(Figures in brackets [] refer to page number of printed Brief for Plaintiff, Opposing Motion for Re-hearing)

[1]

STATE OF MICHIGAN

IN THE

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APPEAL FROM ISABELLA CIRCUIT COURT

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THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a foreign corporation,
Garnishee Defendant and Appellant.

BRIEF FOR PLAINTIFF, OPPOSING MOTION FOR RE-HEARING

Now comes the above named Plaintiff and Appellee, Frank Stevens, and objects to the granting of Garnishee Defendant's and Appellant's Application for re-hearing, for the following reasons:

1. The State Court had the right and the duty to pass upon the sufficiency of the petition for removal. (See discussion and authorities, pages 3 to 7).

[2]

2. After certification, it was the duty of the Federal Court to pass upon the question of removability and to

retain or remand the cause. (See discussion and authorities, pages 7 to 8).

3. Garnishment, under Michigan Statutes and decisions, is an ancillary proceeding not an independent suit. (See discussion and authorities, pages 8 to 11).

4. The Federal Courts respect the decisions of State Courts interpreting their own state statutes and are bound thereby. (See discussion and authorities, pages 12 to 13).

5. The order of the Federal District Court remanding the cause back to the State Court is binding upon the State Courts and cannot be reviewed by them. (See discussion and authorities, pages 17 to 19).

6. Where a cause is removed from a State Court to a Federal Court and thereafter remanded to the State Court, the Federal Court acquires no jurisdiction further than that necessary to remand said cause, and any other action taken therein, by either the court or the parties, is void. (See discussion and authorities, pages 19 to 22).

7. In a cause removed and later remanded by the Federal Court, any action of the State Court made in the interval is valid. (See discussion and authorities, pages 22 to 24).

8. The default and judgment herein relied upon were taken after order remanding cause was filed in State Court. (See discussion and authorities, page 25).

9. The order of the Federal District Court remanding the cause back to the State Court was final and

[3]

unappealable. (See discussion and authorities, pages 25 to 30).

10. The order of the Federal District Court remanding the cause back to the State Court could not be attacked directly, indirectly, or collaterally. (See discussion and authorities, pages 31 to 34).

11. The Garnishee Defendant never asserted its at-

tempt to remove said cause in good faith, and is not acting in good faith in its application for a re-hearing. (See discussion and authorities, pages 34 to 37).

12. All the questions presented in the Garnishee Defendant's application for a re-hearing were fully argued and considered by the Supreme Court in its former hearing. (See discussion and authorities, pages 37 to 39).

13. Questions not raised on appeal will not be considered by this court on re-hearing, nor by Federal Court on review. (See discussion and authorities, pages 39 to 44).

1. The State Court had the right and the duty to pass upon the sufficiency of the Petition for Removal presented to it, in which Petition the Garnishee Defendant sought an Order removing said cause to the United States District Court.

The authorities which sustain such proposition were cited on page 16 of Plaintiff's Reply Brief on file in this Court, and to which Plaintiff now refers this Court for the purpose of brevity. The same rule was followed in *John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company* (48 Minn. 521) which was cited by the Garnishee in its Application.

[4]

In the case at bar, the Petition for Removal presented by the Garnishee to the State Court, showed on its face that there was not only an absence of the diversity of citizenship requirement, but also that the matter which the Petitioner was seeking to have removed was an ancillary proceeding and not an independent or separable controversy.

The reasons for the rule above stated are very ably discussed in a much later Minnesota case, in which case the question of the State Court's right to pass upon the sufficiency of the petition also involved a garnishment action. In this case, *E. A. Pearson vs. Joseph Zacher*,

Western Surety Company, Garnishee, (177 Minn. 182, 1929) the Court said:

"1. It is the claim that the state court had no jurisdiction because of the removal to the federal court. The garnishee says that the state court has no control over the application. This assertion is true only in a limited sense. It must not be understood that the state court has no duty in relation to such application. *It is charged with the duty of determining whether the record presented to it shows upon its face that the applicant has a right to the removal.* It will not yield its jurisdiction until a *legally sufficient record* has been presented, and it is its duty in every case to examine the petition and bond. This is necessary for it to 'accept' them within the meaning of Judicial Code, Sec. 29, USCA, Sec. 72, 36 St. 1095. This is necessary to judicially inform the state court that its power over the cause has been suspended. The mere filing of a petition and bond for the removal of a suit *which it not removable* does not work a transfer. The contents of the papers must disclose the right. Kowalski v. C. & N. W. Ry. Co., 159 Minn. 388, 199 N. W. 178; Stone v. South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29

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L. ed. 962; C. & O. Ry. Co. v. Cockrell, 232 U. S. 146, 34 S. Ct. 278, 58 L. ed. 544; Miner v. C. B. & Q. R. Co., 147 Minn. 21, 179 N. W. 483; Roberts v. C. St. P. M. & O. Ry. Co., 48 Minn. 521, 51 N. W. 478; Id. (C. C.) 45 F. 433; 28 USCA, Sec. 72, notes 325 and 326, p. 499, and note 371, p. 516.

"2. The application papers in this case showed upon their face that they were *legally insufficient because they disclosed to the state court that the only matter involved was a garnishment proceeding.* Such a proceeding is not an independent suit. It is an auxiliary proceeding. It is a mode of execution. It is a means to satisfy the judgment out of the debtor's property. 3 Dunnell, Minn. Dig (2 ed.) Sec. 3949. It

is grafted upon the main suit by statute. It is inseparably connected with the judgment. It is an incidental proceeding in comparison with the main suit. If such proceedings were transferred to the federal court we would have the anomalous situation of that court's engaging in a proceeding to collect a judgment over which it had no jurisdiction. The authorities hold that a garnishment proceeding is not removable. 28 USCA, Sec. 71, note 106, p. 66; Poole v. Thatcherdeft (C. C.) 19 F. 49; Bank v. Turnbull & Co., 16 Wall. 190, 21 L. ed. 296; Brucker v. Georgia Cas. Co. (D. C.) 14 F. (2d) 688.

"3. All the authorities speak of the necessity of the petition's showing its legal sufficiency. 28 USCA, Sec. 372, note, 372, p. 519, and note 373, p. 520. St. Anthony Falls W. P. Co. v. King W. I. Bridge Co., 23 Minn. 186, 23 Am. R. 682; Scheffer v. National Life Ins. Co., 25 Minn. 534. It would therefore seem that *when this necessary showing is absent the application is inoperative to change the jurisdiction,* and the state court may still act because the removal proceedings are a nullity."

[6]

At the hearing on April 15, 1939, on the Garnishee's Petition for Removal, the Circuit Judge gave his reasons for denying same. A certified copy of the transcript of the proceedings on said day was filed by the Garnishee in the Federal Court, and an examination of such transcript shows that the Circuit Judge stated in his opinion that one of the reasons, among others, for denying the Garnishee's Petition, was that: "The garnishment proceeding is ancillary to the main case. This action is for the sole and only purpose of collecting a judgment heretofore rendered against the Principal Defendants, and this Petition is brought by attorneys for the insurance company, who were the same attorneys who appeared for Mr. Northway in the trial of the case, and therefore their information goes to both parties. I am inclined, therefore, to deny the motion and refuse to sign the Order."

Also see the recent case of *Lee vs. Continental Insurance Company* (292 F. 410) in which the Court held that the petition for removal and bond must be presented to the lower court to determine their sufficiency, and in which case the court interprets the word "accept" in the Judicial Code to mean "grant." In other words, the Court holds that before a State Court can grant the petition, it must first examine the contents for the purpose of seeing if facts constituting a removable cause are shown.

We submit, therefore, that because of the insufficiency of the Garnishee's Petition for Removal, that the trial court not only had a legal right to examine into the sufficiency of the Petition for Removal, but that it was its duty to do so; that the insufficiencies were apparent, and that its decision was not only correct, but

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was confirmed by the order of the Federal Court remanding the cause.

2. Even assuming, for the purpose of argument only, that the State Court had no right to pass upon the sufficiency of the Petition for Removal presented to it, nevertheless, the Federal District Court, under the United States Code, had the right to pass upon the Motion to Remand said cause back to the State Court.

We believe that counsel for Garnishee Defendant in their Application concede the correctness of the foregoing statement of law, but to avoid the possibility of any argument over the power and authority of the Federal Court on this question of remand, we herewith quote the entire context of *Paragraph 80, Title 28, U. S. C. C.*:

> "If in any suit commenced in a District Court, or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a

dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as Plaintiffs or Defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court *shall* proceed no further therein, but *shall* dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

On April 15, 1939 attorneys for all of the respective parties were present before the Honorable Judge Tuttle,

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and the Motion to Remand was thoroughly argued, as well as the law involved, and as Attorney Stanton, who was present in Federal Court on said day, wrote to his co-counsel, Attorney Frederick J. Ward in Detroit (See Exhibit C attached to Garnishee Defendant's Answer to Plaintiffs' Motion to Dismiss, on file in the Supreme Court):

"Dear Mr. Ward:

The Motion to Remand was argued before Judge Tuttle, and he followed about the same line of reasoning that I thought he would in this case * * *. He decided to remand the case * * * he said that this was an ancillary proceeding, and if he was to allow the transfer, it would promote considerable confusion, AND HE ANALYZED THE QUESTION VERY CAREFULLY." (Our caps).

3. The action of Garnishment, under the Michigan statutes, and under the decisions of the Michigan Supreme Court interpreting same, is an ancillary proceeding and not an independent suit.

It is unnecessary to quote provisions of the Michigan statutes. A cursory examination immediately reveals that Circuit Court garnishment in Michigan under the

statute is an ancillary proceeding which arises out of and depends entirely upon the principal suit. Our State Courts have uniformly held, without exception, and from an early date, that in Michigan garnishment is an ancillary, not an independent action.

> "It (garnishment) is only incident to the main case and it must fall when that falls. Section 6449."

[9]

Robert Laidlaw vs. Catherine L. Morrow, 44 Mich. at Page 550.

Iron Cliffs Company vs. Edward Lahais, 52 Mich. 394.

> "Section 8145. How. Stat., provides how suits may be commenced in the Circuit Courts of this State against foreign corporations. The Writ of Garnishment and proceedings thereon are always ancillary, and the service of such Writ is not the commencement of an action." *The Milwaukee Bridge & Iron Works vs. Henry N. Breevort, Wayne Circuit Judge,* 73 Mich., at Page 157.

> "The situation must depend upon the principal suit commenced. Garnishment is ancillary and not the commencement of an action." *Wyngarden vs. La-Huis,* 251 Mich. 276.

This Court merely affirmed this long established rule of law in its opinion in this case when it said:

> "The garnishment proceeding is ancillary to the action against the principal Defendants and wholly dependent thereon and not the commencement of an independent action."

Counsel for Garnishee lay great stress upon the case of *Reed vs. Bloom* (19 Fed. Supp. 7; Oklahoma, May 1, 1936), and quote nearly the entire case in Part I of their Application — we say "nearly" because, should we say, inadvertently all of the provisions of the Oklahoma statute upon which Judge Vaught based his de-

cision, were omitted by counsel for Garnishee. The otherwise seemingly unusual conclusion reached by Judge Vaught is easily understood when the full case is read.

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The omissions of these statutory provisions from Garnishee's Brief are all the more obvious in view of the later case of *Lawley, et al. vs. Whiteis, et al.* (*American Surety Company of New York, Garnishee*) (24 Fed. Supp. 698, D. C., N. D., Oklahoma, September 28, 1938) decided by Judge Kennamer in the same Federal District, supporting the general rule and emphasizing the distinction due to the particular statute therein involved. This later decision carefully discusses the statutory provisions which were omitted by counsel for Garnishee from their Brief on Application for re-hearing. The *Lawley* case is referred to in the Citators and is cited, mentioned, and discussed in practically all of the later cases affecting or involving the question of remand.

Judge Kennamer in the *Lawley* case discusses the particular Oklahoma statutory provisions upon which *Reed vs. Bloom* was decided, and, for the benefit of this Court, we now quote, from the *Reed vs. Bloom* decision itself, some of the pertinent parts of those statutory provisions:

> "Section 3708 * * * such motor carrier shall have filed with the Corporation Commission a liability insurance policy * * * and, after judgment against the carrier for any such damage, *the injured party may maintain an action upon such policy or bond* to recover the same, and shall be a proper party so to do.
>
> * * *
>
> "And in section 625 the statute provides: 'The proceedings against a garnishee shall be deemed an action by the Plaintiff against Garnishee and Defendant, as parties defendant, and all the provisions for enforcing judgment shall be applicable thereto.
>
> * * *

"As stated before, the Oklahoma statute, section 3708, supra, makes no reference to a garnishment proceeding, but says: 'After judgment against the carrier for any such damage, the injured party may maintain an action upon such policy or bond to recover the same, and shall be a proper party so to do,' clearly indicating that the Plaintiff, since the rendition of the judgment in the State Court, stands, as it were, in the shoes of the insured, and has the right to maintain the action."

As Judge Kennamer so ably pointed out in the *Lawley* case, the foregoing section 3708 is a distinct and separate statute under which the insurer *must be* joined as a party defendant in the original suit (*Enders vs. Longmire,* 179 Ok. 633, 67 p. (2d) Page 12) and Section 625 (Supra) comes under the Chapter on "Attachment and Garnishment". And likewise, as Judge Kennamer clearly points out, under the Oklahoma statutes, garnishment proceedings *may be* independent proceedings. A careful reading of the *Lawley* case indicates, as pointed out, that the various decisions of the Oklahoma Supreme Court interpreting garnishment statutes and proceedings, deal with the *other* provisions of the garnishment statutes which come under the Chapter of "Execution", and under which, garnishment is and always has been held by the Oklahoma Supreme Court to be an ancillary proceeding.

In view of the apparent reliance placed upon *Reed vs. Bloom* by counsel for Garnishee, we deemed it advisable to place before this Court the entire *Lawley* case, including all statutory provisions therein quoted and relied upon. It will be found following the Conclusion of this Brief.

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4. The Federal courts are bound by the construction given State Statutes, including Garnishment Satutes, by the State Courts, and the Federal Courts respect the decisions of State Courts interpreting their own State Statutes.

Counsel for Garnishee entirely ignore the fact that the Federal District Court in Bay City passed upon the question of the nature of a garnishment action under the Michigan statutes. This Court has established the fact that in Michigan garnishment is an ancillary proceeding. The Federal Court correctly followed this interpretation of the Michigan garnishment statute.

> "A garnishment proceeding, provided by the statutes of Missouri, as construed by the Courts of the State, is not an independent suit, but is supplemental to the main action and provides one of the means of securing a satisfaction of the Judgment. This is the interpretation that the Courts of Missouri have placed upon the state — — All of the Missouri cases seem to be to the same effect. *The construction thus given the statute is not to be ignored in this Court.*" *Brucker vs. Georgia Casualty Company,* 14 F. (2d) 688.

In *Lahman vs. Supernaw,* et al. (47 F. (2d) page 610, District Court, N. D. Oklahoma) the learned District Judge, Franklin E Kennamer, followed the construction placed upon the Oklahoma garnishment statute by the Oklahoma Supreme Court. In its opinion, the Court held:

> "I am of the opinion that the Motion to Remand should be sustained. In the case of *Davidson, et al. vs. Finley, et al,* 96 Okla. 291, it was held that garnishment proceedings in aid of execution 'is practically only an equitable execution brought for the pur-

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may be issued only from the court in which the judgment was rendered. The issuance of an execution for the purpose of obtaining a satisfaction of the judgment is not an independent action."

In a still later decision, Federal Judge Kennamer again reiterated the foregoing rule of law in the case of *Lawley et al. vs. Whitesis et al.* (24 F. Supp. 698, September 28, 1938), wherein he stated:

"The Supreme Court of Oklahoma has determined that garnishment after judgment is practically an equitable execution brought for the purpose of reaching nonleviable assets and is a means provided for obtaining satisfaction of a judgment of a creditor out of the property of the debtor. See First National Bank of Cordell v. City Guaranty Bank of Hobart, 174 Okl. 545, 51 P. 2d 573; Davidson v. Finley, 96 Okl. 291, 222 P. 678. It is thus well established that the proceedings in garnishment after judgment, is auxiliary to the main case and is only a means provided for obtaining satisfaction of a judgment. It has been construed by the Supreme Court of Oklahoma to partake of an equitable execution. *The construction of the Statutes of Oklahoma* governing garnishment proceedings after judgment, *is binding upon this court.* Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487; Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

* * *

"Since the rendition of the decisions in Erie R. Co. v. Tompkins, supra, and Ruhlin v. New York Life Ins. Co., supra, *this court is bound by the construction placed upon garnishment proceedings similar to those involved here, by the Oklahoma Supreme Court, rather than expressions from other Federal Courts with respect to garnishment gener-*

ally. Federal cases with respect to garnishments

not controlling. However, no Federal case has been cited which involves Statutes *identical* with the provisions of the Oklahoma Code."

In *American Automobile Insurance Company vs. Freundt, et al* (103 F. (2d) 613, C. C. A., 7th Circuit, April 27, 1939) the same question arose and the Circuit Court of Appeals followed the decisions of the Supreme Court of Illinois interpreting the Illinois garnishment statutes. In this case Plaintiff had recovered judgment against the Principal Defendants and Plaintiff had commenced garnishment proceedings against the Principal Defendant's insurer; the insurer sought to have its liability determined in Federal Court, under the Federal Declaratory Judgment statute, rather than in the State Court in a garnishment action. The Circuit Court of Appeals held that is was bound by the decisions of the Illinois Supreme Court holding that garnishment was merely an ancillary proceeding, and that therefore the issue as between the Plaintiff and the insurer could only be settled in the State Court in the garnishment action. The Federal Court recognized the foregoing rule of law by saying:

"The only remaining question in which the insurer is interested in whether the judgment creditor can realize upon the contractual obligation of the insurer to protect the insured. Under the law of Illinois as applied to the facts of this case this question can be adjudicated in the pending suit against the insured."

In a still later Federal case, *Toney vs. Maryland Casualty Company* (29 F. Supp. 785, D. C., W. D. Virginia, October 28, 1939) the Court held:

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"*The sole question* in the *case is whether this garnishment under the applicable Virginia statute is an ancillary proceeding.*

* * *

"(5) It is not necessary for me, in sustaining the motion to remand, to express concurrence in these opinions holding that garnishment proceedings are

(even under the statutes of the states in question) in their essential nature independent actions. Nor need I hold that an unusual and extreme statute cannot make garnishments really independent actions rather than ancillary proceedings. *All that I need decide here,* and all that I do decide, *is that under the Virginia Statutes garnishments are mere ancillary proceedings* which are not removable from a state to a federal court."

In *Federal Land Bank of St. Louis, a corporation, Petitioner vs. A. B. Priddy, Circuit Judge* (295 U. S. 229, 79 L. Ed. 1408) the Supreme Court of the United States affirmed the rule that:

"the ruling of the State Supreme Court that Petitioner is a foreign corporation within the meaning of the Arkansas attachment statute, and that the attachment was authorized by local law, presents only a state question, which is not open for review here."

A very recent case which supports Proposition 4 is the case of *George E. Kniess vs. Armour & Co. Appt., and Charles J. Burmeister* (134 Ohio State 432, 17 N. E. (2d) 734, November 30, 1938). The Court said:

"It has always been held that the law of the state from which removal is sought determines whether the controversy is a separable one. *Cincinnati, N. O. & T. P. R. Co. v. Bohon,* 200 U. S. 221, 26 S. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; *Chicago & Alton Ry. Co. v. McWhirt,* 243 U. S. 422, 37 S. Ct. 392,

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61 L. Ed. 826; *Chicago, Rock Island & Pacific Ry. Co. v. Dowell,* 229 U. S. 102, 33 S. Ct. 684, 57 L. Ed. 1090; *Norwalk, adm'x, v. Air-Way Electric Appliance Corp.,* 2 Cir., 87 F. 2d 317, 110 A. L. R. 183, and see annotation at page 191."

In another very recent case argued before the Supreme Court of the United States in the October, 1939 term,

that court decided in a writ of certiorari to the Supreme Court of Michigan a judgment affirming the judgment of the Circuit Court of Wayne County against the Plaintiff or Garnishee Defendant (See *Burr vs. Heffner*, 289 Mich. 91, 286 N. W. 169), that the nature and availability of garnishment in Michigan is solely a question of state law as determined by the state statutes, and by the decisions of the Michigan Supreme Court interpreting such garnishment statutes. Also see *Jacobs and Chaney Michigan Digest, Cumulative Quarterly, April, 1940 No. 2, at page 40.*

But more important, the United States Supreme Court in this *Burr* case affirmed the rule of law that the Federal Courts will be bound by the construction placed by the State Courts upon their state statutes, and held that in Michigan a Writ of garnishment is a civil process of law, in the nature of equitable attachment. We quote from the opinion:

> "Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts. In Michigan a writ of garnishment is a civil process at law, in the nature of an equitable attachment. See *Posselius v. First Nat. Bank,* 264 Mich. 687, 251 N. W. 429, 90 A. L. R. 342.
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> * * *
>
> "Petitioner claims that execution should not have been allowed under the judgment. The Act
>
> [17]
>
> permits the Administrator 'to sue and be sued in any court of competent jurisdiction, State or Federal.' Whether by Michigan law execution under such a judgment may be had is, like the availability of garnishment, *Federal Land Bank v. Priddy,* supra, (295 U. S. 229, 79 L. Ed. 1408, 55 S. Ct. 705) a state question."

5. The Order of the Federal District Court remanding the cause back to the State Court was binding upon the State Courts and could not be reviewed by them.

Counsel for Garnishee, throughout their entire Application, appear to claim that this cause should still be transferred to a Federal Court, and are in effect still claiming that this cause was a removable one. In answer thereto, we can only say that the Federal District Court on April 15, 1939, decided once and for all that said cause should be remanded, and on that day did remand it. In making its Order of Remand it must have decided that the facts contained in the Petition to Remove were insufficient and that the Petition was not a "proper" petition. In other words, the Federal Court decided that the cause never was in fact removable.

We submit that the decision of the Federal District Court holding that the cause never was in fact removable was binding upon the State Circuit Court and is binding upon the State Supreme Court and that the Garnishee cannot now ask this Court to decide otherwise. See P. 71, Title 28, USCA.

In *Tracy Loan & Trust Co. vs. Mutual Life Insurance Co. of New York, et al* (79 Utah 33, 1932), the Court held:

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"The State Court cannot review or correct the ruling of the Federal Court, but must proceed to exercise the jurisdiction over the case which the Federal Court in effect has declared it had no power to supersede. *Feeney v. Wabash R. Co.* (123 Mo. App. 420, 99 S. W. 477."

"This seems to be an attempt to call on this Court to review the decision of the Federal Court in remanding the cause. This we may not do. *Whatever reasons the Federal Court may have had for making its Order remanding the cause, such decision by the Federal Court is final and conclusive* and is not subject to review in this Court. *Rio Grande Western R. Co.*

v. Telluride Power Transmission Co., 23 Utah, 22, 63 P. 995."

The rule of law involved herein is clearly set forth in 114 *A. L. R.*, at Page 1477, wherein we find the following:

> "Specifically referring to the Federal statute whereby it is provided that the order of the inferior Federal Court remanding the cause to the State Court shall be immediately carried into execution, and that no appeal or writ of error from the decision shall be allowed, *State Courts have held uniformly*, albeit in varying phraseology, *that the Order of Remand is not reviewable in the State Courts.*"

Substantiating this rule of law, the Reporter has cited approximately thirty-six cases on pages 1477, 1478 and 1479 of said annotation.

The Supreme Court of Michigan has likewise settled this question once and for all in *Lewis vs. Weidenfeld* (114 Mich. 581) at Page 590, wherein the Court said:

> "Defendant Weidenfeld appeared specially, and moved to remove the case to the United States

> Court. The State Court granted the order. The United States Court, upon motion, remanded the case to the State Court. It is now insisted that this order of the United States Court was erroneous, and that the State Court has no jurisdiction in the cause. This question is settled by the Supreme Court of the United States in *Missouri Pacific R. Co. v. Fitzgerald*, 160 U. S. 556. The Court in that case say, 'If the Circuit Court remands a cause, and the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment.'"

6. Where a cause is removed from a State Court to a Federal Court and thereafter remanded to the State Court, the Federal Court acquires no jurisdiction further than that necessary to remand said cause, and any other action taken therein, by either the Court or the parties, is void.

Even though this question was thoroughly considered in the law briefs heretofore filed in this Court in this cause, counsel for Garnishee are insisting in their Application that this Court again decide this particular question. We are not repeating the authorities previously cited by Plaintiff. They are set forth on Page 11 of Plaintiff's original Brief.

Counsel for Garnishee in Part II of their Application ignore the significance of the words "proper petition." This case was held once and for all time to be not removable, and was remanded to the State Court.

Counsel for Garnishee rely upon *John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company,* (48 Minn. 521, 1892) but despite the excerpt they have picked out from that decision, the Minnesota court

still held in that decision that the proceedings had in the Federal Court between the time of the attempted removal and the order of remand, were void. The reason was, as given by the Court, because the "proper" steps were not taken and therefore the cause never had been a removable cause.

The reasons for this rule are very ably set forth in *Tracy Loan & Trust Co. vs. Mutual Life Insurance Co. of New York, et al.* (79 Utah 33, 7 Pac. Rep. (2d) 279):

> "(3) It is well settled that it is for the state Court to determine what effect, if any, shall be given pleadings filed or orders made in federal courts while the cause was pending there before remand. 54 C. J. 376; Ayres v. Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. Ed. 693; Cates v. Allen, 149 U. S. 451, 13 S. Ct. 883,

37 L. Ed. 804; Broadway Insurance Co. v. Chicago G. W. R. Co. (C. C.) 101 F. 507.

"The rule is stated in 54 C. J. 376, as follows: 'Where remand is based upon want of jurisdiction on the part of the Federal Court at the time of the removal, any findings and orders made by such court pending the remand are not binding, either upon the state court or upon the parties to litigation, except, perhaps, in so far as parties by consenting to such orders may have become bound as by contract; nor on the other hand, can any advantage of such orders be taken by the state court.'

"(4) This rule is well supported by cases which hold that, where remand is based on want of jurisdiction on the part of the federal court, any findings or orders made by such court during the time the case was there are void and are not binding upon the state court nor upon the parties. Graves v. Corbin, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462; Ayres v. Wiswall, supra; Deane v. Corbin, 44 Ill. App. 463; Floody v. Chicago, St. P., M. & O. R.

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Co., 104 Minn. 132, 116 N. W. 111; Colburn v. Hill (C. C. A.) 103 F. 340; Early v. Beecher, 7 Lea (75 Tenn.) 256; Levinski v. Middlesex Banking Co. (C. C. A.) 92 F. 449. An answer filed in such court under such circumstances is not recognized as a pleading in the cause, and does not serve to extend the time within which the party may plead to the complaint in the state court. Citizens' Light, Power & T. Co. v. Usnik, 26 N. M. 494, 194 P. 862; Early v. Beecher, supra. It has also been held that the filing of an answer and cross-complaint in the federal court after removal of the same from the state court did not operate as a waiver of the right in the defendant to file a plea of privilege for change of venue in the state court after the cause was remanded to it. Bishop-Babcock Sales Co. v. Lackman (Tex. Civ. App.) 4 S. W. (2d) 109. From this ruling it would logically follow that the answer and counterclaim

were ineffective as pleadings, and when the cause was remanded it stood in the state court as if no pleadings amounting to the entry of a general appearance had been filed. Removal of the cause to the federal court, followed by a remand, does not prevent the running of the time within which to take an appeal from a judgment rendered in the state court in the interim. Finney v. American Bonding Co., 13 Idaho, 534, 90 P. 859, 91 P. 318; Mills v. American Bonding Co., 13 Idaho, 556, 91 P. 381."

* * *

"We think it follows from these cases that the answer and counter claim filed in the Federal Court was without effect as to the initiation of the contest *because filed in a court without jurisdiction of the cause.*"

The case of *Morgan vs. Kroger Grocery & Baking Co.* (96 F. (2d) 470, C. C. A. 8th Circuit) cited by Garnishee in its Application, held that the cause was

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actually removed at the time the Petition for Removal was presented to the State Court, because the Petition itself, read in the light of the Missouri statutes and decisions thereunder, which held that joint liability could not exist under the facts alleged by Plaintiff, and therefore a "proper" Petition was filed. Again, the Circuit Court of Appeals in this case held that a "proper" Petition was filed because, among other things, the cause was at the time in fact removable.

In *Bishop & Babcock Sales Company of Ohio vs. Lackman* (4 S. W. (2d) 109, Texas C. A., 1928), the Texas court followed the rule laid down in *Tracy Loan & Trust Co. vs. Mutual Life Insurance Co. of New York, et al.*, to the effect that "it is well settled that it is for the State Court to determine what effect, if any, shall be given pleadings filed or orders made in Federal Courts while the cause was pending there before remand." And because of the peculiar Texas statute, the Court held

as it did. And right here we point out to this Court that the *Lackman* (Texas) case is the only case which we were able to find, and likewise apparently the only case which counsel for Garnishee were able to find, which indicated an opinion contrary to the well established general rule above stated.

7. On the removal of a Cause, if it afterwards appears that the Suit was not a proper one for removal, and is remanded by the Federal Court, any act of the State Court made in the interval is valid.

This proposition was also thoroughly covered in Plaintiff's Brief now on file in this cause, and again for the sake of brevity, we refer this Court to pages 16, 17 and 18 therein, and especially the authorities cited on Page 18 of Plaintiff's Brief.

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Counsel for Garnishee especially rely upon the case of *John Roberts vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, but despite the excerpt they have chosen therefrom, the Court nevertheless held that the judgment of $21,905 which was given by the Court to the Plaintiff against the Garnishee Defendant during the interval in which the Garnishee claimed it was in Federal Court, was a valid judgment and was not affected by the subsequent remand of the case from the Federal Court to the State Court. In other words, the Court held that the judgment given in the interval between the attempted removal and the actual remand was a valid judgment, because, again, the cause was never "properly" removed. The *Roberts* case was eventually appealed to the United States Supreme Court and on December 7, 1896, as reported in 164 U. S. 703, application for a writ of certiorari was denied, and by such denial, the *United States Supreme Court affirmed* the holding of the lower District Court *that the judgment, or act of the State Court made in the interval, was valid.*

If counsel for Garnishee had run down, so to speak, the *Roberts* case in the Citator, they would have found a

still later Minnesota case which very clearly and unequivocably affirms the correctness of the proposition herein claimed by the Plaintiff. In this later Minnesota case of *E. A. Pearson vs. Joseph Zacher, Western Surety Company, Garnishee,* (177 Minn. 182, 1929) the Court held:

> "It is sufficient for us to hold, as we do, that on such removal of a cause, if it afterward appears that the suit was not a proper one for removal and is remanded by the Federal Court, any act of the State Court made in the interval is valid. *Yankaus v. Feltenstein,* 244 U. S. 127, 37 S. Ct. 567,

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> 61 L. Ed. 1036; *Western Indemnity Co. v. Kendall,* 27 Ariz. 342, 233 p. 583; *Union G. & O. Co. v. Indian-Tex Petroleum Co.* 203 Ky. 521, 263 S. W. 1; *Roberts v. C. St. P. M. & O. Ry. Co.* 48 Minn. 521, 51 N. W. 478; 34 Cyc. 1308."

The rule is again affirmed in *Tracy Loan & Trust Co. v. Mutual Life Insurance Company of New York, et al.* (79 Utah 33).

> *"But where a motion for removal is made and the petition is not effective for that purpose, or after removal the Federal Court remands the cause for want of jurisdiction, and in the interim orders are made or judgment entered by the State Court, these are valid notwithstanding they are made after attempted removal. Yankaus v. Feltenstein,* 244 U. S. 127, 37 S. Ct. 567, 61 L. Ed. 1036; *State v. American Surety Co.,* 26 Idaho, 652, 145 P. 1097, Ann. Cas. 1916E, 209; *Western Indemnity Co. v. Kendall,* 27 Ariz. 342, 233 P. 583; *Union Gas & Oil Co. v. Indian-Tex Petroleum Co.,* 203 Ky. 521, 263 S. W. 1; Foster's Federal Practice (6th Ed.) 3041. The reason or theory underlying these results is that when a case is remanded by the Federal Court for want of jurisdiction, the State Court is regarded as never having lost its jurisdiction, and the Federal Court never acquired jurisdiction. *Finney v. American Bonding*

Co., supra; and *Germania Fire Insurance Co. v. Francis*, 52 Miss. 457, 24 Am. Rep. 675; 43 C. J. #45."

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8. Even assuming, for the purpose of argument only, that acts of the State Court in the interval between the attempted removal and the actual remand, are not valid, then nevertheless there were valid acts done in the State Court and by the State Court after the order of remand was filed in the State Court, to substantiate the judgment which was entered against the Garnishee Defendant.

In discussing this proposition, we are particularly impressed by the apparently deliberate failure on the part of counsel for Garnishee to remember that the record in this case discloses that on April 17, 1939, AND AFTER THE ORDER OF REMAND WAS FILED IN THE STATE COURT, the default was re-entered by the Plaintiff against the Garnishee Defendant and judgment rendered in favor of the Plaintiff.

We are unable to find anything in Garnishee's Application which in any way attacks such default of April 17, 1939, entered after the Order of Remand was filed in the State Court, and we are unable to find any claim in Garnishee's Application that such default was not a valid and regularly entered default.

9. The Order of the Federal District Court remanding the cause back to the State Court was final and unappealable.

The provisions in *Paragraph 71, Title 28, U. S. C. A.* applicable, read:

> "When any cause shall be removed from any State Court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately

carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."

The books are replete with cases substantiating this proposition, and yet counsel for Garnishee in their Application are in effect now appealing to this Court and asking for a decision that they should be permitted to still get into Federal Court, and asking this Court to find that Federal District Judge Tuttle erred in his opinion that this cause never was a removable cause. The authorities do not sustain counsel, but even though the case was a removable one, Judge Tuttle decided otherwise. And his decision cannot be reviewed by any Federal Court or any State Court, directly or indirectly.

Pacific Live Stock Co. vs. Lewis, 241 U. S. 440; 60 L. Ed. 1084;
Missouri Pacific R. Co. vs. Fitzgerald, 160 U. S. 556; 580-583. 40 L. Ed. 536;
Travelers Protective Ass'n of America, vs. Smith, 71 Fed. (2d) 511;
Leslie vs. Floyd Gas Co., 11 F. Supp. 401;
Notes to *U. S. C. A., Title 28, Sec. 71, page 392.*

Also see *Missouri Pacific Railway Company vs. Mary Fitzgerald* (160 U. S. 556, 40 Law Ed. 536), wherein the Court held:

"As under the statute a remanding order of the Circuit Court is not reviewable by this Court on appeal or writ of error from or to that Court, so it would seem to follow that it cannot be reviewed on writ of error to a State Court, the prohibition being that 'no appeal or writ of error from the decision of the Circuit Court remanding such cause

shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under Paragraph

709 in respect of such an order, *where the State Court has rendered no decision against a Federal right but simply accepted the conclusion of the Circuit Court.*

We regard this result as intended by Congress, in effectuation of the object of the act of March 3, 1887, to restrict the jurisdiction of the Circuit Court and to restrain the volume of litigation which, through the expansion of Federal jurisdiction in respect of the removal causes, had been pouring into the Courts of the United States." (Authorities cited).

Also see *Samuel Nelson vs. Dennis Moloney,* (174 U. S. 164, 43 Law Ed. 934).

In *Chicago, St. Paul, Minneapolis & Omaha Railway Co. vs. Hensley* (25 F. (2d) Page 861, C. C. A. 8th Circuit, 1928) it appears that the lower Federal District Court issued a temporary injunction restraining the State Court from acting, but that upon the hearing upon the merits, in which the Plaintiff moved to remand said cause, the Federal District Court rendered a decree vacating its temporary injunction and denied the Petition of the railway company seeking a permanent injunction to restrain the Plaintiff from collecting its $14,000 judgment, and remanded the case to the State Court. The railway company appealed from the order of remand, and the Circuit Court of Appeals held:

"(1, 2) When the court below rendered its decree, the real and controlling issue was whether the case before the court had been properly removed to that court, so that it had jurisdiction to proceed and determine its merits. Plenary power had been granted to the federal court below, and

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the duty had been imposed upon it to decide that issue. It had carefully considered it upon evidence and argument, and it adjudged that the case had not been properly removed; that it had no jurisdiction to try or determine the merits of the case.

Its decree put into effect that decision. From that decree the railway company has appealed, but this appeal is futile (1) because the decree is not reviewable by this court, since title 28, section 71, U. S. Code (28 USCA Sec. 71), provides that, 'whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed'";

Without going further into the vast number of authorities sustaining this proposition, we feel it is sufficient to call the Court's attention to the last word on the question, namely, the case of *Employers Reinsurance Corp. vs. Bryant, U. S. District Judge* (229 U. S. 374, 81 L. Ed. 289, 57 S. C. 273) which was decided by the United States Supreme Court on January 4, 1937. We have checked the Citator and find no later law by the United States Supreme Court on this particular phase of the law. In this case the Appellant applied for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the 5th Circuit denying a Petition for writs of mandamus and prohibition directed to the judges of the District Court for the purpose of vacating an order of remand. The learned Justice Van Devanter delivered the opinion of the Court, stating:

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"We are of opinion the petition was rightly denied, first, because the remanding order was not subject to appellate reexamination on petition for mandamus or otherwise, and, secondly, because even if open to reexamination on petition for mandamus, the order was made in the exercise of lawful authority and was appropriate to the situation in which it was made.

"A leading case on the subject is *In re Pennsylvania Co.*, 137 U. S. 451, which dealt with a petition for mandamus requiring the judges of a circuit court to reinstate, try and adjudicate a suit which they, in the circuit court, had remanded to the state court whence it had been removed. After referring to the earlier statutes and practice and coming to the Act of March 3, 1887, this Court said (p. 454):

"In terms it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of

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an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.'

"The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of Sections 71 and 80, Title 28, U. S. Code. They are in pari materia, are to be con-

strued accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey v. Lockhart*, 123 U. S. 56, 58, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter.

"It follows that the remanding order of the district court was not subject to reexamination by the circuit court of appeals on the petition for mandamus."

The Bryant case is followed by all of the later Federal decisions, and was especially controlling in *In re: Satterley* (102 F. (2d) 144, C. C. A., 5th Circuit, March 3, 1939), in which case an application had been made for leave to file a petition for writs of mandamus, prohibition, certiorari and injunction, and the Circuit Court of Appeals held that the judgment of the Federal District Judge that the case was not a proper one for removal, was "not reviewable in this Court by any form of procedure (citing *Employers Reinsurance Corporation .vs. Bryant*). This Court being without jurisdiction, to review the order of remand, the petition is denied."

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10. The Order of the Federal District Court remanding the cause back to the State Court could not be attacked directly, indirectly, or collaterally.

We feel that the above proposition is pertinent to the issues now before the Court for the reasons, as stated before, it is apparent from Garnishee's Application that it is attempting to attack the Order of Remand made over a year ago by the Federal District Court.

In *Yankaus vs. Feltenstein* (244 U. S. 127), a judgment was entered in favor of the Plaintiff and against the Defendant by the City Court of the City of New York during the interval in which Appellant claimed that the Federal District Court had exclusive jurisdiction of the cause because of the removal proceeding the Appellant

had undertaken. After the cause was remanded to the State Court, the Appellant and Defendant moved in the City Court to set aside the judgment rendered while it was alleged the suit was pending in the United States District Court, which motion was denied. Appellant then appealed to the New York Supreme Court, appellate term, which Court affirmed the lower Court. Appellant then appealed to the United States Supreme Court, and this Court held:

> "As we view this case, we think the judgment of the court below must be affirmed, as this proceeding is practically an attempt to review an order remanding a cause attempted to be removed to the District Court of the United States. Section 28 of the Judicial Code provides that 'whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came,
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>
> such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.'"
>
> "For the reasons stated, the case was remanded to the City Court. We think these orders, with the accompanying memoranda and opinion, taken together, show that the District Court denied its jurisdiction, and remanded the cause to the City Court. In this attitude of the case, the judgment of the state court must stand, as the effect of the orders of the District Court was to hold the attempted removal unauthorized. This court has more than once held that such an order is not subject to review; directly *or indirectly,* but is final and conclusive. *Missouri Pacific Ry. Co. v. Fitzgerald,* 160 U. S. 556, 580-583; *McLaughlin Brothers v. Hallowell,* 228 U. S. 278, 286; *Pacific Live Stock Co. v. Oregon Water Board,* 241 U. S. 440, 447."

"It follows that the judgment of the City Court of the City of New York must be affirmed."

In *Chicago, St. Paul, Minneapolis & Omaha Railway Company v. Hensley* (25 F. (2d) Page 861), (see facts as set forth in discussion of cause under Proposition 9), the Court refused to grant the relief prayed for in the ancillary petition filed in equity for a permanent injunction, because the decision and decree of the court below to remand the case "is not reviewable by this court by means of the ancillary suit in equity in this case." *McCabe v. Guaranty Trust Co.* (C. C. A.) 243 F. 845, 847, 849; *Mestre, Atty. Gen., v. Russell & Co.* (C. C. A.) 279 F. 44, 46; *Dillinger v. Chicago, B. & Q. R. Co.*, (C. C. A.) 19 F. (2d) 196; *Aldredge v. B. & O. R. Co.* (C. C. A.) 20 F. (2d) 655.

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Likewise, the Court in *Moffet et al. v. Robbins,* (14 Fed. Supp. 602, D. C., Kan. September 4, 1935) held that an order of the Federal District Court remanding the cause to the State Court was not reviewable in a subsequent suit to enjoin enforcement of the judgment rendered in the State Court. In other words the Court held that there could not be any collateral attack, and that the matters sought to be reviewed in the collateral proceedings, were res judicata. We quote from the opinion:

"Complaint is made of an order of Judge Pollick remanding the cause complained of to the District Court of Harper County, Kan. The remanding order was final and *cannot be brought here indirectly for review. City of Waco, Tex., v. United States F. & G. Co.,* 67 F. (2d) 785, 786 (C. C. A. 5).

* * *

"I am of the opinion the Plaintiff has had her day in Court and issues as presented in her bill are now res judicata. *Coleman v. Apple,* 298 F. 718, 720, 721 (C. C. A. 8); *United States v. Throckmorton,* 98 U. S. 61, 25 L. Ed. 93."

The *Moffet* case was appealed to the Circuit Court of

Appeals (281 F. (2d) 431) which affirmed the lower Court, and the Circuit Court of Appeals' decision was in turn appealed to the United States Supreme Court which denied a writ of certiorari on May 18, 1936 (See 56 S. Ct. 940, 298 U. S., 675, 80 L. Ed. 1397).

The proposition of law above stated by Plaintiff, is substantiated by the authorities cited in 114 *A. L. R.* at page 1484, in which the compilers state the rule to be as follows:

> "Failure has uniformly met attempts to obtain appellate consideration of an inferior Federal
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> [34]
>
> Court's order remanding a cause to the State Court, where such attempts have taken the form of appeals from or writs of error to the lower court to review its decision as to a matter dependent upon the order of remand."

The annotation commencing with page 1484 gives the various authorities sustaining this rule of law.

11. The Garnishee Defendant never asserted its attempt to remove said cause in good faith, and is not acting in good faith in its application for a re-hearing.

A. In their Application, counsel for Garnishee rather flourishingly use the words "good faith" and indicate same was a controlling factor in all their acts and conduct. We have no choice but to call their attention to their utter lack of good faith shown by them throughout this proceeding, and especially as shown by the record (See pages 98-104, 105, 106, 108, 109-117).

B. Counsel for Garnishee again speaks of "an attorney who believes he has a removable cause" (Page 14 of Application) and who asserts "in good faith that the right to remove the cause existed" (Page 15 of Application). In reply to such contention we can only refer counsel for Garnishee to Exhibit C which they attached in Garnishee Defendant and Appellant's Answer to Plain-

tiff and Appellee's Motion to Dismiss on file in this Court, in which Exhibit, on April 15, 1939, Attorney H. Monroe Stanton wrote to Frederick J. Ward, said Garnishee's co-counsel, as follows:

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"In re: 74013 — Stevens v. Northway, et al.

Dear Mr. Ward:

"The motion to remand was argued before Judge Tuttle, and he followed about the same line of reasoning THAT I THOUGHT HE WOULD IN THIS CASE (our Caps) * * * However, after the other attorneys argued * * * he decided to remand the case, basing his decision on the case of BRUCKER V. GEORGIA CASUALTY COMPANY and RUSSELL V. GENERAL ACCIDENT, *with which you are familiar* (Our italics) * * *."

How can counsel for Garnishee claim that they acted in good faith when one of their counsel admits himself that the Federal District Judge "followed about the same line of reasoning that I thought he would in this case." It is very evident that the attorney for Garnishee, having read the authorities above mentioned before such attempted removal, well knew that in view of such authorities, the Federal District Judge would do just what he "thought he would in this case." And as to the other co-counsel for Garnishee, it is very evident that he was "familiar" with these cases.

C. Also having in mind the foregoing letter, we believe we are justified in saying that the claims, now being made by counsel for Garnishee in their new appeal under their Application, that this Court in effect reverse the decision of the Federal District Judge on the question of remand, are not being made in good faith because of the further statements made by Attorney Stanton to Attorney Ward in said letter, as follows:

"But he (Judge Tuttle) said that this was an ancillary proceeding, and if he was to allow the

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transfer, it would promote considerable confusion, and *he analyzed the question very carefully.*"

"In my opinion, we would get nowhere appealing from this decision, and we may as well handle it in the State Court, having in mind that we will probably get beat before Judge Hart and have to appeal the case."

* * *

Yours very truly,
H. Monroe Stanton."

D. Furthermore, the contention made by counsel for Garnishee that they are acting in good faith in this Application is negatived very definitely by a certain letter or communication written since the decision of this Court rendered on April 1, 1940, in which communication counsel for Garnishee communicated with counsel for Plaintiff on April 10, 1940, and in which communication said Garnishee, through its counsel, agreed to pay said judgment "immediately." We at first questioned the propriety of submitting this letter as a part of this Brief, but in view of the various claims of good faith on the part of counsel for Garnishee, we believe such communication is relevant to show merely another instance, in a long course of conduct on the part of counsel for Garnishee, which discloses an utter lack of good faith on their part. In this letter, the full context of which is disclosed as Exhibit 1 at the end of this Brief, Counsel Frederick J. Ward wrote to counsel for Plaintiff as follows:

"If you will kindly let me have a statement as to the amount due in this case, I will arrange to see that it is taken care of immediately."

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Mr. Ward was and is the attorney of record for said Garnishee Defendant, and an examination of the various affidavits executed by him in the Record and elsewhere, definitely shows that he was and is authorized to act on

behalf of the Garnishee Defendant. We mention this to circumvent any claim on the part of the Garnishee itself that Attorney Ward was not authorized to communicate as he did.

12. All the questions presented in the Garnishee Defendant's application for a re-hearing were fully argued and considered by the Supreme Court in its former hearing.

The Garnishee is now asking this Court to reverse its former action in which it affirmed the judgment of the lower court. However, Garnishee's Application and Brief for Re-hearing states no new points or authorities in support thereof, and presents no questions not already submitted, fully considered and decided upon in the previous hearing of this cause.

It is well settled that a re-hearing will not be granted unless it is shown either that some question decisive of the case and duly submitted by counsel has been overlooked, or that the Court has based its decision on the wrong principle of law. A cause of action must be shown, that is, it must appear that the judgment was erroneous and the Court must be satisfied that it made a mistake of law or misunderstood the facts. It is with these rules in mind that, despite the numerous and decisive authorities cited by Plaintiff in his original brief, Plaintiff has nevertheless again cited numerous and controlling authorities in this Brief. A cursory reading of the Supreme Court's opinion just rendered,

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immediately discloses that the learned Judge who wrote the opinion was not only very familiar with the facts, but was also especially familiar with the various dates involved in the case.

It is also a well settled principle of law that a re-hearing will be denied where the questions presented by the Petition or Application were fully argued and considered by the Court in the former hearing. And we

also understand it to be a well settled principle of law that a re-hearing will not be granted merely for the purpose of re-arguing a case on points already considered and determined, unless some new and decisive authority has been discovered which was overlooked by the Court. Neither will a re-hearing be granted when in deciding the case the Court had considered the questions raised, although all of them may not have been discussed in the opinion. And neither will a re-hearing be granted to consider questions or points of law not previously raised in the former proceedings.

This Court is very familiar with the various cases and authorities substantiating the above rules of law, and therefore we do not quote verbatim from them, but we do cite the following cases and authorities in support of the foregoing propositions.

Hutchins v. Kimmell, 31 Mich. 126;
Thompson v. Jarvis, 40 Mich. 526;
Kraft v. Raths, 45 Mich. 20;
MacLean v. Scripps, 52 Mich. 214;
Nichols, Shepard & Co. v. Marsh, 62 Mich. 439;
Gaskill v. Weeks, 156 Mich. 668;
Spitzley v. Garrison, 208 Mich. 50;
4 Corpus Juris, 624;
3 Am. Juris Prudence, 346, 347;

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Taylor v. Boardman, 24 Mich. 287, 302;
Seymour v. Detroit C. & B. Rolling Mills, 56 Mich. 117, 123;
Badger v. Boyd, 65 S. W. (2d) 601;
Louisville R. R. v. U. S. Fidelity Co., (Tenn.) 148 S. W. 671;
Hollowbush v. McConnel, 12 Ill. 203;
Blatchford v. Newberry, 106 Ill. 584, 592;
Parker v. State, (Ind.) 33 N. E. 119;
Stacy v. Glen Ellyn Hotel & Springs Co. (Ill.) 79 N. E. 133;
Sioux City & St. Paul R. Co. v. U. S., 160 U. S. 686 — 40 L. Ed. 583;

Buck Owens, et al. v. Hagenbeck Wallace Shows Co. (192 A. 158, 464, Rhode Island, 1937).

13. The State Supreme Court will not review on application for re-hearing, questions which were not presented to it by the Appellant in its original appeal, and neither will the Federal Courts, including the United States Supreme Court, review any claimed constitutional questions where they were urged for the first time upon petition for a re-hearing.

A. Up to the time of the filing of its Application for re-hearing, Garnishee Defendant had never claimed that the due process clause under the Federal Constitution, had been violated. At no time during any of the proceedings in the trial Court was any such claim made. We have carefully re-read the various reasons set forth by Garnishee in its Special Appearance and Motion to Set Aside Default (Record, p. 72-75) and likewise carefully re-read Garnishee's Assignments of Error and Reasons and Grounds for Appeal, and likewise

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carefully re-read Garnishee's original law brief filed in this Court — and nowhere, in any of said pleadings, nor in any other pleadings, or papers executed by Garnishee or on its behalf, was any claim ever made that the due process clause of the Federal Constitution had been violated.

We also call this Court's attention to the oral arguments made by counsel for Garnishee at the time this cause was argued before this Court and point out that at no time during such arguments was any claim made by Garnishee's counsel that the Fourteenth Amendment had been violated. It is only now, for the first time, that such issue is attempted to be injected into this cause, with an apparent intent to confuse the issues before this Court.

As early as 1869, this Court decided that a petition for re-hearing, on a question not presented by the plead-

ings and not passed upon by the trial Court nor on the former hearing, will be denied. *Ryerson v. Eldred,* 18 Mich. 49.

We again submit that at no time prior to this new Application by the Garnishee, was the law in question ever mentioned by the Garnishee Defendant or its counsel. In a very recent decision, this Court has held that a re-hearing will not be granted where the statute which is claimed to be controlling was not called to the Court's attention, involved in issue, nor passed on. *Wilcox v. Board of Commissioners of Sinking Fund of City of Detroit,* (262 Mich. 699), re-hearing denied.

Also see *Blankenship vs. Blankenship* (276 Pac. 9, Nevada, 1929), which is also reported in 63 A. L. R. 1127, at Page 1131, wherein the Court held:

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> "This Court has repeatedly held that a point raised for the first time on a petition for re-hearing will not be considered. *Beck v. Thompson,* 22 Nev. 419, 41 Pac. 1; *Kirman v. Johnson,* 30 Nev. 146, 93 Pac. 500, 96 Pac. 1057; *Gamble v. Hanchett,* 35 Nev. 319, 133 Pac. 936; *Nelson v. Smith,* 42 Nev. 302, 320, 176 Pac. 261, 178 Pac. 625; *Re Forney,* 43 Nev. 227, 242, 24 A. L. R. 553, 184 Pac. 206, 186 Pac. 678; *Pedroli v. Scott,* 47 Nev. 313, 31 A. L. R. 841, 221 Pac. 241, 224 Pac. 807. A departure from this well-established rule is not advisable."

To the same effect is *Shea vs. Pilette* (189 A. 154, Vermont, 1937), which case is also reported in 109 A. L. A. 933.

And likewise the Indiana Supreme Court has held that a question of res judicata will be deemed waived where not presented in the original brief on appeal, and will not be considered where first presented upon a petition for re-hearing. *Hutchinson vs. Arnt* (1 N. E. (2d) 585, 4 N. E. (2d) 202, Indiana, 1936), which case is also reported in 108 A. L. R. 530.

B. Likewise, the Federal Courts, including the Supreme Court of the United States, will refuse to review a case where a so-called federal question is injected into the case in the State Court for the first time on the Appellant's Application for a re-hearing.

A very clear and concise decision on this question, which is also pertinent to some of the other aspects of the case at bar, was written by the very able scholar Justice Brandeis, in *American Surety Company, Plff. in certiorari v. Vivian F. Baldwin, et al, Vivian F. Baldwin, et al, v. American Surety Company* (287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, November 14, 1932), which is also reported in 86 *A. L. R.* 298. These two

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cases were consolidated in the Supreme Court because they both arose out of the same set of facts. In each case the *American Surety Company* sought to be relieved from a judgment of $22,357.21 in the one case and from a judgment for a smaller amount in the other case. In each case the Appellant Surety Company claimed that the judgment was void under the due process clause of the Fourteenth Amendment. The Court stated:

> "First. The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed for failure to make seasonably the Federal claim. * * * The Baldwins appealed to the Supreme Court of Idaho; and upon the presentation of their appeal no federal question was raised by either party."
>
> * * *
>
> "The Surety Company petitioned for a re-hearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the

action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. (Citations).

* * *

"Second. In No. 21, the Circuit Court of Appeals should have affirmed the decree of the Federal Court for Idaho which denied the Surety Company's application for an interlocutory injunction

[43]

and dismissed the bill. *For the federal remedy was barred by the proceedings taken in the State Court which ripened into a final judgment constituting res judicata.*"

* * *

"The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a State Court drawn in question in an independent proceeding in the Federal Courts. (Citations). The principles of res judicata apply to questions of jurisdiction as well as to other issues. (Citations). They are given effect even where the proceeding in the Federal Court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the State Courts. (Citations). The principles of res judicata may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, res judicata, and precludes a suit to enjoin enforcement of the judgment. (Citations). Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; *and since the constitutional issue as to jurisdiction might have been presented to the State Supreme Court and*

reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want to jurisdiction." (Citations).

* * *

"The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the State Courts. Instead of moving to vacate, it should have appealed directly to the State Supreme Court. When later it pursued the proper course the time for appealing had elapsed. The fact that its opportunity

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for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied. (Citations). Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the Federal Court. Federal claims are not to be prosecuted piecemeal in State and Federal Courts, whether the attempt to do so springs from a failure seasonably to adduce relevant facts, as in (Citations) or from a failure seasonably to pursue the appropriate state remedy.

* * *

"Petition for rehearing denied January 9, 1933."

In *87 A. L. R. at Page 307,* will be found a footnote with innumerable authorities sustaining the proposition that failure to comply with state rules of practice prevents the United States Supreme Court from considering a federal claim on direct review.

CONCLUSION

In conclusion, Plaintiff contends that this Court has correctly decided the case at bar and that therefore Garnishee's Application for a re-hearing should be denied.

As herein stated, it is Plaintiff's position that the State Court had the right to pass upon the sufficiency of the Petition for Removal presented to it at the time the Garnishee Defendant sought an order from the State Court to remove said cause to the Federal District Court; that, even assuming, but only for the purpose of argument, that the State Court had no right

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to pass upon the sufficiency of the Petition for Removal presented to it, and that, as Garnishee contends, such presentation was in the nature merely of a formality, Plaintiff still shows unto this Court that the Federal District Court, under the United States Code, still had the right to pass upon the motion made in Federal Court to remand said cause back to the State Court.

That the action of garnishment under the Michigan statutes, and under the decisions, not only of the Michigan Supreme Court, but also the United States Supreme Courts, interpreting state garnishment statutes, is an anciliary proceeding and a proceeding inseparable from the principal suit, and not an independent suit; that the Federal Courts are bound by the construction given state statutes, including garnishment statutes, by the State Courts, and the Federal Courts, including the United States Supreme Court, respect the decisions of the State Courts interpreting their own state statutes; that the order of the United States Federal District Court, for the Eastern District of Michigan, Northern Division, remanding the cause back to the State Court, was binding upon the State Courts and could not be reviewed by them; that in the event a cause is removed from a State Court to a Federal Court and thereafter remanded to the State Court, the Federal Court acquired no jurisdiction further than that necessary to remand said cause, and any other

action taken in the interim, by either the Federal Court or the parties, is void.

That on the attempted removal of the cause to a Federal Court, if it afterwards appears that the cause was not a proper one for removal, and is remanded by the Federal Court, any action of the State Court made in the interval between such attempted removal and such

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actual remand, is valid and binding upon all the parties; that, even assuming, but only for the purpose of argument, that acts of the State Court in the interval between the attempted removal and the actual remand, are not valid, then nevertheless there were valid acts done in the State Court and by the State Court after remand to substantiate the judgment which was entered in this cause against the Garnishee Defendant; that the order of the Federal District Court remanding the cause back to the State Court is final and unappealable; and will not be reviewed by any other Court; that the order of the Federal District Court remanding the cause back to the State Court cannot be attacked directly or collaterally.

That the Garnishee Defendant herein never asserted its attempt to remove said cause in good faith, and, as clearly shown by its acts and conduct, is not acting in good faith in its Application for a re-hearing; that all of the questions presented in the Garnishee Defendant's Application for a re-hearing were fully argued and considered by the Supreme Court in its former hearing; that the State Supreme Court will not review on Application for a re-hearing, questions which were not presented to it by the Appellant in its original appeal, and likewise, neither will the Federal Courts, including the United States Supreme Court, review any claimed constitutional questions where they are injected or were urged for the first time upon the Petition for a re-hearing.

Wherefore, Plaintiff herein respectfully submits that

the Application for a re-hearing made by the Garnishee herein, should be denied.

Respectfully submitted,

B. A. WENDROW,
WORCESTER & WORCESTER.

[47]

LAWLEY et al. v. WHITEIS et al. (AMERICAN SURETY CO. OF NEW YORK, (Garnishee)
No. 2701

(*24 Fed. Supp. Page 698*)

District Court, N. D. Oklahoma
Sept. 28, 1938

"FRANKLIN E. KENNAMER, District Judge.

Margaret Lawley, the mother, and as Administratrix of the estate of W. E. Lawley, deceased, recovered a judgment in the District Court of Tulsa County, against Bert Whiteis and L. Sevy, for the wrongful death of a son, caused by an automobile accident. After the rendition of judgment for the plaintiffs, an execution was issued and was returned no property found. Thereafter, garnishment summons was issued under Sections 863 and 864, of Title 12, Okl. St. Ann., Sections 500 and 501, O. S. 1931, against the American Surety Company of New York, seeking to subject to the payment of the judgment an amount claimed to be due to the defendant under a policy of liability insurance alleged to have been issued by the garnishee to the defendant prior to the time of the fatal accident. Interrogatories were submitted along with the garnishment summons, as provided by the Oklahoma Statute.

The garnishee filed its answer denying that it was indebted to the defendant, and further denying that it had ever written any insurance policy covering the defendants, and alleging that the defendant, Bert Whiteis, the owner of the truck involved in the accident was a carrier for hire under the laws of the State of Okla-

homa, and required by such law to obtain a permit from the Corporation Commission of the State of Oklahoma,

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which he had neglected to do, and was therefore engaged in the business of hauling for hire, in violation of the law. The garnishee further alleged that it was prohibited by law from issuing casualty insurance to any person engaged in a like business, because the garnishee had never qualified under the laws of the State of Oklahoma and the rules and orders of the Corporation Commission to issue casualty insurance covering vehicles hauling for hire. The plaintiff filed notice of election to take issue with the answer of the garnishee, and the garnishee, within the time provided by law, filed its petition and bond for removal, and an order removing the cause to this court was duly entered. The matter comes on for hearing upon plaintiff's motion to remand.

Plaintiff and defendants are residents of the State of Oklahoma, and the garnishee, the American Surety Company of New York, is a non-resident of Oklahoma, being a corporation organized under the laws of the State of New York. The judgment obtained against the defendants was in the amount of $4,000, plus interest and costs. The only question presented is whether the garnishment proceedings against the American Surety Company is a suit of a civil nature between citizens of different states and which can be fully determined as between them, within the purview of the removal statutes. If the garnishment proceedings instituted in this case are merely ancillary or supplemental proceedings to the suit in the State Court and the judgment rendered therein, then the same is not removable to this Court. On the other hand, if such proceedings are independent suits, then they are probably removable.

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The question presented here has had the consideration of the United States District Court for the Western District of Oklahima, and has also been considered by

this court. See Reed v. Bloom, D. C., 15 F. Supp. 7; Luhman v. Supernaw et al., D. C., 47 F. 2d 610.

Honorable Edgar S. Vaught, Judge of the District Court for the Western District of Oklahoma, concluded that such proceedings were removable. The contrary result was reached in this court. The contrary ruling of Judge Vaught has compelled a careful reconsideration of the removability of such proceedings, with the result that the question has been carefully investigated as if it were a new one for this jurisdiction. While the decision in the case is not free from doubt, and is not a question easy of determination, still, in view of the construction placed upon the Statutes of Oklahoma by the highest court of this State, construing the nature of the proceedings, it must be concluded that garnishment proceedings under the particular Statutes noted above, are auxiliary and ancillary to the suit resulting in judgment, under which such proceedings are authorized.

(1) The difficulty involved in determining the removability of such proceedings lies in determining the character of the garnishment proceedings. If, under the Statutes of Oklahoma, garnishment does not partake of the nature of an independent suit, or litigation, but is merely auxiliary to the main action, or supplemental to it, and a means of securing a satisfaction of judgment rendered therein, it is not removable. Pratt v. Albright, C. C., 9 F. 634. On the other hand, if such proceedings are independent suits, they may be removed.

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The Statutes of Oklahoma provide for garnishment proceedings before as well as after judgment. The Statutes referred to above are applicable to proceedings after judgment has been obtained. The proceedings prescribed therein differ from proceedings prior to the entry of judgment, and the Statute under which garnishment proceedings were instituted herein are authorized by the statute in aid of execution only after execution has been returned unsatisfied. They are found in and constitute a part of the chapter of the Oklahoma Statutes on

"Executions and Other Proceedings To Enforce Judgments." Garnishment proceedings are also authorized by Sections 497, 484, 495 and 498, O. S. 131, being Sections 847, 848, 861 and 850, of Title 12, Okl. St. Ann. These provisions are not applicable to the instant case, because the procedure involved herein was instituted under the authority of the Sections of the Statute first referred to.

The Supreme Court of Oklahoma has determined that garnishment after judgment is practically an equitable execution brought for the purpose of reaching nonleviable assets and is a means provided for obtaining satisfaction of a judgment of a creditor out of the property of the debtor. See *First National Bank of Cordell vs. City Guaranty Bank of Hobart*, 174 Okl. 545, 51 P. 2d 573; *Davidson vs. Finley*, 96 Okl. 291, 222 P. 678. It is thus well established that the proceedings in garnishment after judgment, is auxiliary to the main case and is only a means provided for obtaining satisfaction of a judgment. *It has been construed by the Supreme Court of Oklahoma to partake of an equitable execution. The construction of the Statutes of Oklahoma* governing garnishment proceedings after judgment, *is binding upon this court. Erie R. Co. vs. Tomp-*

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kins, 304 U. S. 64, 58 S. Ct. 817 82 L. Ed. 1188, 114 A. L. R. 1487; *Ruhlin vs. New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

Under the Oklahoma Statutes, after answer has been filed by the garnishee and notice of election to take issue is filed by the Plaintiff, the issue shall stand for trial as a civil action, in which the affidavit on the part of the Plaintiff shall be deemed the petition and the garnishee's affidavit the answer thereto. Sec. 620, O. S. 1931, Sec. 1177, Title 12, Okl. St. Ann. In Sec. 625, O. S. 1931, Sec. 1182, Title 12, Okl. St. Ann., it is provided that the proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant, as parties defendant. *The above statutory provisions appear under the chapters on "Attachment and Garnish-*

ment", while the provisions of the Statute under which proceedings were undertaken in this case, are a portion of the chapter of the Oklahoma Statutes under "Execution". Attachment and garnishment proceedings *may be* independent proceedings under certain provisions of the Oklahoma Statutes, *but such proceedings may also be in aid of execution, or ancillary to the main suit and the judgment rendered therein.* The proceedings in this case were pursuant to the statutory provisions governing executions, and therefore did not constitute an independent controversy.

(2) It is well settled that a State cannot prevent the removal of actions from its courts to the Federal Court by statutory enactment. See Terral v. Burke Construction Co., 257 U.S. 529, 42 S. Ct. 188, 66 L. Ed. 352, 21 A. L. R. 186; Donald v. Philadelphia Co. et al., 241 U. S. 329, 36 S. Ct. 563, 60 L. Ed. 1027. No attempt has been made in the instant case to prevent a removal

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by a Statute, but the proceedings provided therein do not come within the removal act, because they are not independent proceedings or suits. Statutory proceedings for the taking of private property for public uses cannot deny a non-resident the right of removal when the other jurisdictional requirements are met (see Pacific Railroad Removal Cases, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319), but such proceedings are independent actions.

(3) It is contended by the garnishee that garnishment proceedings in Oklahoma are independent proceedings, and they urge in support of their argument the requirement that a motion for new trial be filed before the judgment rendered in such proceedings will be reviewed by the Supreme Court of Oklahoma, citing Cassidy v. Thompson, 84 Okl. 33, 202 P. 201; Brooks v. Fields, 25 Okl. 427, 106 P. 828. The latest case of the Oklahoma Supreme Court requiring the filing of motion for new trial is Dawson Produce Co. v. Cohn, 172 Okl. 28, 44 P. 2d 1034. The requirement of the filing of motion for new trial in order to obtain a review in the Supreme

Court, is not controlling of the question. There may be various questions involved in the same suit, and if such questions are ancillary to the main controversy, the same does not constitute an independent suit, despite the fact that the litigants in the ancillary proceedings are required to file motions for new trial in order to obtain a review by the Supreme Court of Oklahoma of the questions involved.

Since the rendition of the decisions in *Erie R. Co. vs. Tompkins*, supra, and *Ruhlin vs. New York Life Ins. Co.*, supra, *this Court is bound by the construction placed upon garnishment proceedings similar to those involved here, by the Oklahoma Supreme Court, rather*

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than expressions from other Federal Courts with respect to garnishments, even if under Statutes similar to Oklahoma's, are not controlling. However, no Federal case has been cited which involves Statutes identical with the provisions of the Oklahoma Code.

(4) In *Reed vs. Bloom*, supra, the court refers to certain statutory provisions of Oklahoma with respect to the necessity of filing public liability policies as a condition to obtaining certificates of convenience and necessity for motor carriers. The Statute, as construed by the Supreme Court of Oklahoma, provides for joining the insurance carrier along with the insured as original parties defendant in cases of liability on account of accidents. *Enders vs. Longmire*, 179 Ok. 633, 67 P. 2d 12. The particular Statute is not involved in this case. The carrier in such cases is made a party defendant by reason of the Statute. In cases similar to the one here presented, there is no provision for joining the insurance carrier as a party defendant; such insurance company, if it has issued a policy indemnifying the assured against loss from liability for damages on account of injuries, etc., is subject to garnishment proceedings. Maryland Casualty Co. v. Peppard, 53 Okl. 515, 157 P. 106, L. R. A. 1916E, 597.

(5) As the proceedings in garnishment were instituted

in this case under the particular Statute, which proceedings have been construed to be practically an equitable execution brought for the purpose of reaching non-leviable assets, and is merely a means provided for obtaining satisfaction of a judgment, it is merely auxiliary and ancillary to the main suit and judgment, and does not constitute an independent action, and is therefore not removable.

The motion to remand is sustained."

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EXHIBIT 1

FREDERICK J. WARD
Attorney and Counsellor at Law
Dime Building
Detroit, Mich.

Robert E. Plunkett
Dexter A. Clark
William H. Sheppard

April 10, 1940

Mr. B. A. Wendrow
Mt. Pleasant, Michigan
Commercial Block

Re: 74013 Stevens vs. Northway et al.

Dear Sir:

Beg to acknowledge receipt of your communication of April 9th, enclosing Bill of Costs, which I note you have set for taxation on the 15th.

If you will kindly let me have a statement as to the amount due in this case, I will arrange to see that it is taken care of immediately.

Yours very truly,

(Signed) F. J. Ward.
Frederick J. Ward.

FJW:MJA

STATE OF MICHIGAN,—ss.

In the Supreme Court
Clerk's Office

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the brief of plaintiff opposing motion for rehearing, filed in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 26th day of September, A. D. 1940.

Jay Mertz,
Clerk.

(SEAL)

MOTION TO REMAND

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

FRANK STEVENS,
Plaintiff,

vs.

R. A. NORTHWAY, doing business under the assumed name of NORTHWAY CLINIC AND HOSPITAL, R. A. NORTHWAY, ROY B. FISHER,
Principal Defendants,

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a foreign corporation,
Garnishee Defendant.

Now comes the above named R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital, R. A. Northway and Roy B. Fisher, principal

defendants, by their attorneys, Crane & Crane, and appear specially for the purposes of this motion only, saving and reserving any and all objections which they or each of them have to the manifold imperfections in the mode, manner and method of the removal papers, and expressly denying that this Court has jurisdiction of this cause or of these defendants, respectfully moves the Court to remand this cause to the Court from which it was alleged to be removed, the Circuit Court for the County of Isabella, State of Michigan, for the reasons following:

1. That the controversy in this action and every issue of fact and law herein is not wholly between citizens of different states and cannot be fully determined as between them. The record in this cause shows that the plaintiff, Frank Stevens, is a resident of the County of Isabella, State of Michigan, and that the defendant, R. A. Northway, doing business under the assumed name of Northway Clinic and Hospital and R. A. Northway is a resident of the City of Mt. Pleasant, Isabella County, State of Michigan, and that the defendant Roy B. Fisher formerly was a resident of the City of Mt. Pleasant, Isabella County and State of Michigan, and now is a resident of the City of Midland, County of Midland and State of Michigan. Further that at the time of the commencement of said action the Circuit Court for the County of Isabella had unquestioned jurisdiction over all of the parties to this action and that this jurisdiction has continued and does now continue in executing and administering its own process. Further that the Garnishee Defendant, The Metropolitan Casualty and Insurance Company of New York has domesticated itself in the State of Michigan, has a license and is authorized to do business in the State of Michigan, has power to sue and be sued, has appointed a resident agent and for all the purposes of this action has submitted itself to the jurisdiction and laws of the State of Michigan and is amenable to process issued by the Circuit Court for the County of Isabella, State of Michigan.

2. That the principal defendants in this action are necessary parties to the determination of the issues be-

tween the plaintiff and the garnishee defendant and that said defendants are necessary and indispensable parties to this action and that the issues and controversies involved herein are not separable.

3. That the Writ of Garnishment heretofore issued by the Circuit Court for the County of Isabella, State of Michigan, is ancillary and in aid of the main case heretofore instituted and adjudicated in the Circuit Court for the County of Isabella, State of Michigan, and is substantially an aid of the Court by way of execution in reaching non-leviable assets of the principal defendants.

4. That there is no dispute or controversy as to the fact or construction of the constitution or laws of the United States involved in said action.

5. That on April 4, A. D. 1939, the Honorable Ray Hart, Circuit Judge for the County of Isabella, State of Michigan, did deny the Petition of the garnishee defendant for the removal of said cause as should appear by the record.

WHEREFORE, said principal defendants therefore pray that this Honorable Court enter an Order that this cause is improperly removed and order the same to be remanded to the Circuit Court for the County of Isabella, State of Michigan, from whence it came, and that such remand shall be immediately carried into execution.

Crane & Crane,
William E. Crane,
Attorneys for R. A. Northway, doing business as Northway Clinic and Hospital, R. A. Northway and Roy B. Fisher.
Business Address:
308-309 Second National Bank Building,
Saginaw, Michigan.

Dated: April 11, 1939.

STATE OF MICHIGAN

ss.

COUNTY OF SAGINAW

WILLIAM E. CRANE being duly sworn deposes and states that he is one of the members of the firm of Crane and Crane, attorneys, of Saginaw, Michigan, and that he is licensed to practice law in the State of Michigan and admitted to practice law in the State of Michigan and in the District Court of the United States for the Eastern District of Michigan, Northern Division.

Deponent states that R. A. Northway and Roy B. Fisher are clients of the firm of Crane & Crane and that he personally knows that said R. A. Northway is a citizen of the United States and of the State of Michigan and resides at Mt. Pleasant, Michigan.

Deponent further states that Roy B. Fisher is a citizen of the United States and of the State of Michigan, and resides in the City of Midland, County of Midland, Michigan.

Further Deponent states not.

William E. Crane.

Subscribed and sworn to before me, a Notary Public in and for said County, this 11th day of April, A. D. 1939.

Gertrude L. Smalling,
Notary Public, Saginaw County, Michigan.
My commission expires March 22, 1940.

United States of America

ss:

Eastern District of Michigan

I, George M. Read, Clerk of the United States District Court in and for the Eastern District of Michigan, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Remand now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal (SEAL) of the aforesaid Court at Bay City this 25th day of September, A. D. 1940.

George M. Read,
Clerk.
By Ethel Fletcher,
Deputy Clerk.

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pp. 2, 4

SUPREME COURT OF THE UNITED STATES.

No. 425.—October Term, 1940.

Metropolitan Casualty Insurance Co., Petitioner, *vs.* Frank Stevens, Respondent. } On Writ of Certiorari to the Supreme Court of the State of Michigan.

[March 17, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

We are asked in effect to hold invalid a default judgment entered by a state court in a garnishment proceeding after it had denied a petition for removal to a federal district court. The principal questions are whether we may review an order of the federal district court remanding the suit to the court from which it was removed, and whether the latter court was free to disregard a disclosure filed in the federal court before the default judgment was entered. From the record the following appears.

On March 8, 1939, respondent obtained a writ of garnishment from a Michigan state court requiring petitioner to appear on or before March 31 and disclose whether it was liable to individuals against whom respondent had recovered a judgment. On March 28, petitioner filed an application and bond in the state court for removal of the proceeding to the proper federal district court. On April 4, the state court denied the application. On April 10, petitioner filed in the federal district court copies of all papers on record in the state court and its disclosure denying any liability to respondent or to the judgment debtors. The next day, respondent entered petitioner's default in the state court for failure to appear, and notified petitioner that respondent would move for judgment on April 17.

On April 15, petitioner notified respondent of its attempt to remove the suit notwithstanding the ruling of the state court. Respondent promptly moved to have the proceeding remanded, and on the same day the district judge granted the motion. The remand order was filed in the state court on April 17. Respondent thereupon entered petitioner's default a second time, introduced evidence, and obtained a default judgment. On April 18, petitioner unsuccessfully moved to vacate the judgment. Appeal to the Michigan Supreme Court followed and the judgment was affirmed. 293

Mich. 31. Because it involved important questions concerning the removal statute (28 U. S. C. § 71), we brought the case here. 311 U. S. —.

Petitioner contends that the garnishment proceeding was removable as a separable controversy and that the state court therefore was without jurisdiction to enter the default judgment. Further, petitioner contends in substance that the petition for removal when filed in the state court deprived that court of power to proceed with the cause, at least until the federal court had passed upon the question of removability, and that in all events the refusal of the state court to accord any legal effect to the disclosure filed in the federal district court while the petition for removal was pending there was a denial of a federal right given by the removal statute, *supra*. We cannot agree.

The case is ruled by *Yankaus* v. *Feltenstein*, 244 U. S. 127.[1] There we held that an order of a federal district court remanding the cause to the state court was not reviewable directly or indirectly, and affirmed the judgment of the state court even though it had been secured by default.[2] While the opinion does not expressly consider the effect of a petition for removal on subsequent proceedings in the state court, the clear import of the decision is that the proceedings are valid if the case was not in fact removable. See *Southern Pacific Co.* v. *Waite*, 279 Fed. 171; *Commodores Point Terminal Co.* v. *Hudnall*, 279 Fed. 607; *First National Bank* v. *Bridge Co.*, 9 Fed. Cas. 88.[3]

The rule that the remand order is not reviewable stems from § 28 of the Judicial Code (28 U. S. C. § 71) and from many decisions adjusting the relationship of state and federal courts and the scope of authority of each in cases sought to be removed from the

[1] Feltenstein and another brought suit in a state court against Yankaus on October 11, 1915. On October 16, Yankaus filed a petition for removal in the state court, and on October 20 filed copies of all papers on record in the state court and an answer in the federal court. On the latter date the state court denied his petition for removal, and on October 26 entered judgment against him. On November 15, the federal court remanded the cause, and two weeks later the state court denied a motion to vacate the judgment. The state appellate court subsequently dismissed an appeal.

[2] It is not evident from the opinion that the judgment was taken by default, but this fact clearly appears in the record filed in this Court. Record, p. 7.

[3] See Pearson *v.* Zacher, 177 Minn. 182; Roberts *v.* Chicago, etc. Ry. Co., 48 Minn. 521 (certiorari denied, 164 U. S. 703); Tierney *v.* Helvetia, etc. Ins. Co., 126 App. Div. 446; State *v.* American Surety Co., 26 Idaho 649. — 652

Compare Iowa Central Ry. Co. *v.* Bacon, 236 U. S. 305; Madisonville Traction Co. *v.* St. Bernard Mining Co., 196 U. S. 239; Stone *v.* South Carolina, 117 U. S. 430; Phoenix Ins. Co. *v.* Pechner, 95 U. S. 183; Winchell *v.* Coney, 54 Conn. 24; Tomson *v.* Traveling Men's Ass'n, 78 Neb. 400; Golden *v.* Northern Pacific Ry. Co., 39 Mont. 435; Dahlonega Co. *v.* Hall Mdse. Co., 88 Ga. 339; Bishop-Babcock Sales Co. *v.* Lackman, 4 S. W. (2d) 109.

former to the latter. The rule that proceedings in the state court subsequent to the petition for removal are valid if the suit was not in fact removable is the logical corollary of the proposition that such proceedings are void if the cause was removable. *Iowa Central Ry. Co.* v. *Bacon*, 236 U. S. 305; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239; *Virginia* v. *Rives*, 100 U. S. 313; *Phoenix Insurance Co.* v. *Pechner*, 95 U. S. 183; *Home Life Ins. Co.* v. *Dunn*, 19 Wall. 214; *Gordon* v. *Longest*, 16 Pet. 97.[4]

When a petition for removal to a federal court is denied by the state court, the petitioner may do one of three things. He may object to the ruling, save an exception, and litigate the cause in the state courts. *Iowa Central Ry. Co.* v. *Bacon, supra; Stone* v. *South Carolina*, 117 U. S. 430; *Baltimore & Ohio R. R. Co.* v. *Koontz*, 104 U. S. 5; *Removal Cases*, 100 U. S. 457; *Gordon* v. *Longest, supra.* He may remove the suit to the federal court despite the ruling of the state court. *Baltimore & Ohio R. R. Co.* v. *Koontz, supra; Kern* v. *Huidekoper*, 103 U. S. 485; *Home Life Ins. Co.* v. *Dunn, supra.* He may proceed in both courts at the same time. *Kern* v. *Huidekoper, supra; Removal Cases, supra.*

If the petitioner litigates the cause in the state court and preserves an exception, he may have the order of the state court denying his petition for removal reviewed in the state appellate court. In proper cases he may come here asserting a denial of his right of removal. *Iowa Central Ry. Co.* v. *Bacon, supra; Stone* v. *South Carolina, supra; Removal Cases, supra.* If he removes the cause to the federal district court despite the state court ruling and the federal court assumes jurisdiction over the objection of his adversary, the latter, after final judgment, may contest this assumption of jurisdiction in the circuit court of appeals, and in this court in proper cases. *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92; *Cates* v. *Allen*, 149 U. S. 451; *Graves* v. *Corbin*, 132 U. S. 571. If petitioner proceeds simultaneously in state and federal courts and both render final judgments, he and his adversary may obtain review of the question of removability by following respectively the courses just outlined. *Kern* v. *Huidekoper, supra; Removal Cases, supra.*

Petitioner is protected whichever course he elects. If he makes timely application for removal and properly objects to its denial

[4] See Centaur Motor Co. *v.* Eccleston, 264 Fed. 852; Montgomery *v.* Postal, etc. Co., 218 Fed. 471; Donovan *v.* Wells, Fargo Co., 169 Fed. 363; Murphy *v.* Payette Alluvial Gold Co., 98 Fed. 321; Johnson *v.* Wells, Fargo Co., 91 Fed. 1; Shepherd *v.* Bradstreet Co., 65 Fed. 142.

by the state court, participation in subsequent proceedings in the state court is not a waiver of his claim that the cause should have been litigated in the federal court. *Powers* v. *Chesapeake & Ohio Ry. Co., supra; Removal Cases, supra; Home Life Ins. Co.* v. *Dunn, supra.* Compare *Miller* v. *Buyer,* 82 Colo. 474; *State* v. *American Surety Co.,* 26 Idaho 649; *Ashland* v. *Whitcomb.* 120 Wis. 549. If he removes the cause notwithstanding the state court ruling, he may nevertheless resist further action by his opponent in the state court. *Kern* v. *Huidekoper, supra; Removal Cases, supra.*

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However, the issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause. Section 28 of the Judicial Code, *supra,* precludes review of the remand order directly (*Kloeb* v. *Armour & Co.,* 311 U. S. 199; *Employers Reinsurance Corp.* v. *Bryant,* 299 U. S. 374; *City of Waco* v. *U. S. Fidelity & Guaranty Co.,* 293 U. S. 140; *Ex parte Pennsylvania,* 137 U. S. 451), or indirectly after final judgment in the highest court of the state in which decision could be had. *McLaughlin Brothers* v. *Hallowell,* 228 U. S. 278; *Missouri Pacific Ry. Co.* v. *Fitzgerald,* 160 U. S. 556; compare *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440.

Here, petitioner attempted to remove the cause, as he had a right to do, even though the state court had denied his petition for removal. The federal court held it was not removable as a separable controversy and remanded it to the state court. For the reasons already stated, we are not at liberty to review the remand order. Consequently, we must assume, so far as this case is concerned, that the suit was not removable. Having made this assumption, we must conclude that the state court had jurisdiction to enter the default judgment (*Yankaus* v. *Felterstein, supra; Southern Pacific Co.* v. *Waite, supra*), and it was for that court to determine the effect of the disclosure filed in the federal court. *Ayres* v. *Wiswall,* 112 U. S. 187; *Broadway Ins. Co.* v. *Chicago, etc. Ry. Co.,* 101 Fed. 507; compare *Tracy Loan & Trust Co.* v. *Mutual Life Ins. Co.,* 79 Utah 33. If, in cases like the present one, the state court is assured that the federal court will decide promptly the question of removability, it is better practice to await that decision (*Chesapeake & Ohio Ry. Co.* v. *McCabe, supra; Baltimore & Ohio R. R. Co.* v. *Koontz, supra*), but we cannot say that failure to do so is a denial of a federal right if the cause was not removable.

Accordingly, the judgment of the Michigan Supreme Court is affirmed.